MISSISSIPPI LAW JOURNAL

FROM *PRUETT* TO *PRESLEY*: THE LONG AND WINDING ROAD TO ABROGATION OF COMMON LAW SOVEREIGN IMMUNITY IN MISSISSIPPI

David W. Case

THE PURSUIT OF DEEP POCKETS: AN HISTORICAL OVERVIEW OF PUNITIVE DAMAGES IN MISSISSIPPI

John G. Corlew

ALLOCATION OF FAULT: JOINT TORTFEASORS IN COURT AND THE ONES WHO SHOULD BE

Cheri D. Green
Michael K. Graves

AN EVALUATION OF THE MISSISSIPPI PRODUCTS LIABILITY ACT OF 1993

Bobby Marzine Harges

OBTAINING A PATIENT'S CONSENT TO MEDICAL TREATMENT: INFORMED CONSENT UNDER MISSISSIPPI LAW

TORT REFORM AND THE MISSISSIPPI CONSTITUTION OF 1890

INDEX—VOLUME 63

VOLUME 63 SPRING 1994 NUMBER 3

RECENT DECISIONS OF THE MISSISSIPPI SUPREME COURT

THE UNIVERSITY OF MISSISSIPPI
1854
SCHOOL OF LAW

Keep your office informed with a subscription to the *Mississippi Law Journal* briefs of decisions of the Mississippi Supreme Court.

Briefs are written by *Journal* members and mailed by Tuesday of the week after the decisions are rendered, several weeks before cases are printed in the regional reporter. You can receive this weekly publication and be up to date for only $50.00 per year—an indispensable service! Subscribe now, or write for a free sample of the most current briefs.

Mississippi Law Journal
P. O. Box 849
University, Mississippi 38677-0849

NOTICE

Change in Subscription Price

WE PROVIDE

MORE ASSET MANAGEMENT SERVICES

IN ONE LOCATION

THAN ANY OTHER ORGANIZATION

IN MISSISSIPPI.

The Trust Division
DEPOSIT GUARANTY®
National Bank
Grow with us®
Member FDIC

ADMINISTRATIVE OFFICERS
OF THE
UNIVERSITY OF MISSISSIPPI

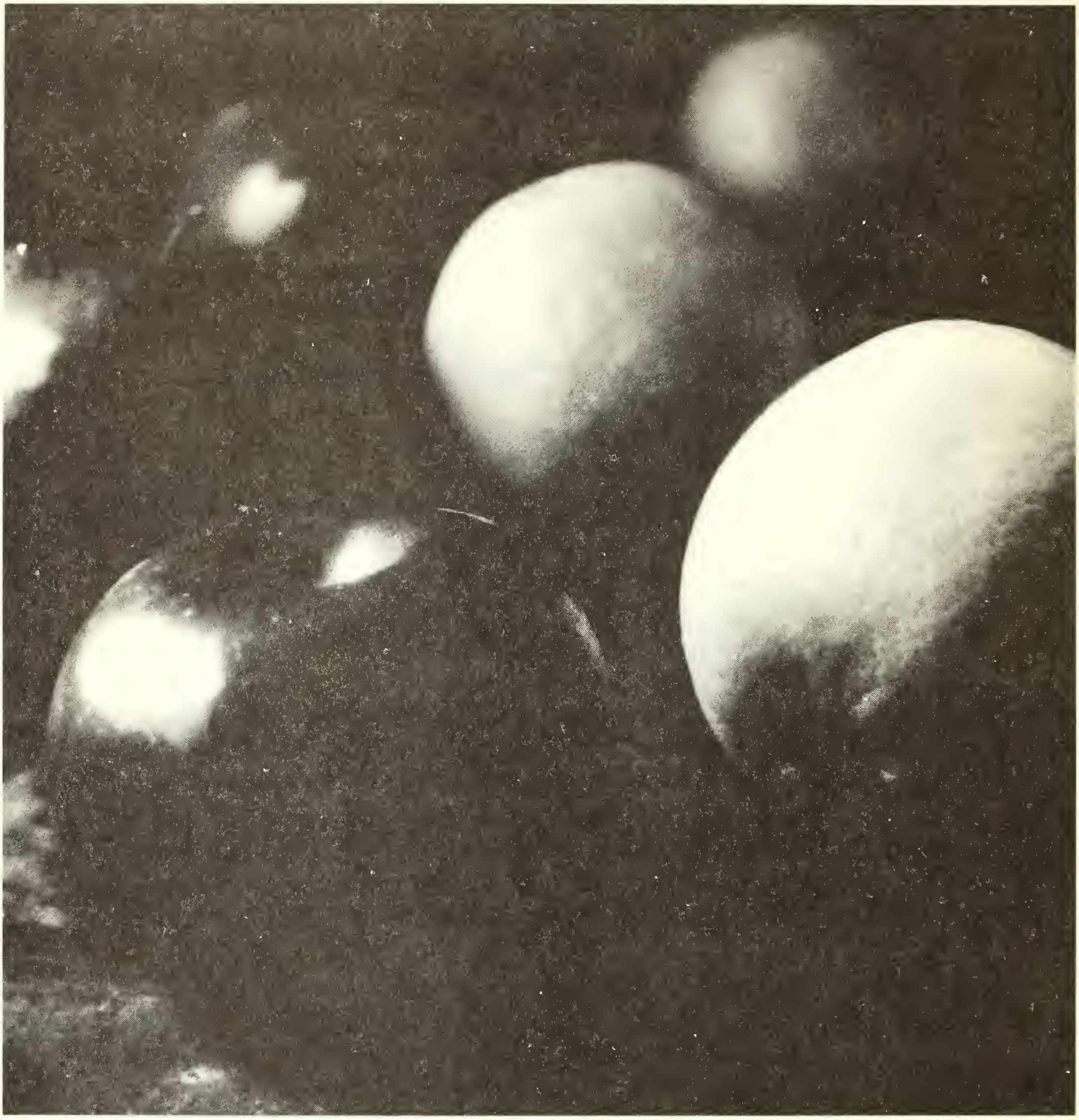
R. GERALD TURNER, *Chancellor*
H. RAY HOOPS, *Vice Chancellor for University Affairs*
J. LESLIE WYATT, *Vice Chancellor for Executive Affairs*
DOYLE L. RUSSELL, *Vice Chancellor for Administrative Affairs*
DONALD PETERS, *Vice Chancellor for Student Affairs*
DON L. FRUGE, *Vice Chancellor for University Affairs*
CAROLYN ELLIS STATON, *Acting Dean of the School of Law, Director of the Law Center and Professor of Law*

THE LAW SCHOOL FACULTY

GUTHRIE T. ABBOTT, *Butler, Snow, O'Mara, Stevens and Cannada Lecturer in Law and Professor of Law*
DONNA D. ADLER, *Assistant Professor of Law*
RICHARD L. BARNES, *Leonard B. Melvin, Jr. Lecturer in Law and Professor of Law*
DEBORAH H. BELL, *Director of the Housing Law Clinic and Associate Professor of Law*
JOHN R. BRADLEY, *Professor of Law*
WILLIAM HOUSTON BROWN, *Adjunct Professor of Law*
LARRY S. BUSH, *Associate Professor of Law*
WILLIAM M. CHAMPION, *Mississippi Defense Lawyers' Association Lecturer in Law and Professor of Law*
HERBERT E. CIHAK, *Director of the Law Library and Assistant Professor of Law*
GEORGE C. COCHRAN, *Professor of Law*
AARON S. CONDON, *Emeritus of Law*
ROBERT N. DAVIS, *Associate Professor of Law*
THOMAS R. ETHRIDGE, *Emeritus of Law*
MICHAEL D. FEATHERSTONE, *Professor of Law*
DON L. FRUGE, *Vice Chancellor for University Affairs and Professor of Law*
EVELYN GANDY, *Visiting Professor and Whitten Chair*
STEPHEN GOROVE, *Professor Emeritus of Law*
DUKE GOZA, *Visiting Professor of Law*
KAREN O. GREEN, *Professor of Law*
ANNE BROWNLEE GULLICK, *Acting Assistant Professor, Legal Writing*
JOHN R. HAILMAN, *Adjunct Professor of Law*
TIMOTHY L. HALL, *Associate Professor of Law*
MICHAEL H. HOFFHEIMER, *Mitchell, McNutt, Threadgill, Smith & Sams Lecturer in Law and Associate Professor of Law*
STANLEY HUGGINS, *Adjunct Professor of Law*

JUDITH KOONS, *Assistant Clinical Professor, Housing Law Clinic*
ROBERT C. KHAYAT, *Professor of Law*
THOMAS R. MASON, *Associate Dean and Professor of Law*
GARY MYERS, *Associate Professor of Law*
LARRY J. PITTMAN, *Assistant Professor of Law*
SYLVIA ROBERTSHAW, *Acting Assistant Professor, Legal Writing*
JAY R. ROBINSON, *Adjunct Professor of Law*
RONALD J. RYCHLAK, *Mitchell, McNutt, Threadgill, Smith and Sams Lecturer in Law and Associate Professor of Law*
CAROLYN ELLIS STATON, *Acting Dean of the School of Law and Professor of Law*
GEORGE W. STENGEL, *Professor Emeritus of Law*
NOAH S. SWEAT, JR., *Professor of Law*
BRYN R. VAALER, *Associate Professor of Law*
ROBERT A. WEEMS, *Professor of Law*
A.C. WHARTON, *Adjunct Professor of Law*
AMY WHITTEN, *Adjunct Professor of Law*

UNTIL NOW, TITLE COMPANIES
WERE ABOUT AS EASY TO COMPARE.



These days, a lot of title companies claim to be financially sound. But too often, what they promote are isolated ratios and statistics that are not a true measure of financial strength. In fact, they are often misleading.

At Mississippi Valley Title, we saw the need for **standardized** claims-paying-ability ratings for title insurers. That's why we asked to be rated by Standard & Poor's. We were given an A+ — the highest rating from S&P in the title industry to date — along with our affiliate and co-underwriter, Old Republic National Title Insurance Company, who received an A+ rating for the second year in a row.

Ask another title company for their rating from Standard & Poor's. If they don't have one, ask why. Then call Mississippi Valley Title.

MISSISSIPPI VALLEY TITLE
INSURANCE COMPANY

315 Tombigbee Street; P.O. Drawer 2428
Jackson, MS 39225-2428
(601) 969-0222 (800) 647-2124 (AL/MS/TN)

Mississippi Law Journal

Published by Students at the
University of Mississippi School
of Law

VOLUME 63 **SPRING 1994** **NUMBER 3**

Copyright © 1994, Mississippi Law Journal, Inc.

Editor in Chief
JOHN J. HEALY, III

Assistant Editor
BRADLEY W. SMITH

Business Manager
G. CLARK MONROE II

Managing Editor
MARK H. TYSON

Articles Editors
GOODLOE LEWIS
SHELBY RICKETTS
HOLLEY DAVIS THAMES

Case Note Editors
JACKYE L. CHAPMAN
DEANNE M. MOSLEY
MANDI NORTON

Citations Editor
CAROLE ESTES

Alumni Director
WADE SWEAT

Case Notes Competition Chairmen
CARMEN M. SHINDALA
ALAN K. SUDDUTH

Administrative Assistant
PEGGY C. NAIL

Comment Editors
SAMUEL ANDERSON
GENA NOBILE CORY
SAMMY L. WOOD

Mississippi Cases Editors
THOMAS L. CARPENTER
WALTER ALAN DAVIS
JOHN HOLADAY

Index & Review Editor
MARGARET MURDOCK

Symposium Editor
GIGI GAERIG

Special Project Editors
RYAN E. BYRNE
MICHAEL V. CORY, JR.

Faculty Advisors
GUTHRIE T. ABBOTT
DEBORAH H. BELL
MICHAEL HOFFHEIMER

STAFF

George E. Abdo III
Sheldon G. Alston
Thomas C. Anderson
Mark Aquadro
William G. Armistead
Christine Bateman
Candace Ferrell Bhavsar
Gerry M. Blaker II
Joshua Braunstein, Jr.
Sara Frances Brent
Barry Bridgforth
Michael Caples
Rick Circeo
Christy Crockett
Mike Cronin
Henry Dick, III
Brad Dillard
Jason Ehrlinspiel
Donald E. Eicher, III
Charles Ferguson
Sam Goza
Mark Griffin
Brad Hathaway
Rob Hoskyn
Paul Hurst
Amy Jackson
Bradley P. Jones
Maurcie L. Kervin
Mark Lampton
James McCullough, II
Whit McKinley
Tad McRaney
Trace D. McRaney
Jeff Mannisto
David Maron
Lisa Meggs
Grant Monroe
Steve Montagnet
Jean Renee Moore
Craig Orr
Lanny Pace
Michael Parsons
Matt Powers
Fred Pruner
Rick Pyper
Brett Robinson
Lee Rikard
Gary Rikard
Russell Shaw
Mark Smith
John B. Sneed, III
Reid Stanford
Phillip Sykes
Oscar Thomas
Britt Virden
Misty Wakeland
Thomas Waller
William Walter

Mississippi Law Journal

Published by Students at the
University of Mississippi School
of Law

VOLUME 63 **SPRING 1994** **NUMBER 3**

Copyright © 1994, Mississippi Law Journal, Inc.

TABLE OF CONTENTS

ARTICLES

FROM *PRUETT* TO *PRESLEY*: THE LONG AND WINDING ROAD TO ABROGATION OF COMMON LAW SOVEREIGN IMMUNITY IN MISSISSIPPI . . . . *David W. Case* 537

THE PURSUIT OF DEEP POCKETS: AN HISTORICAL OVERVIEW OF PUNITIVE DAMAGES IN MISSISSIPPI . . . . *John G. Corlew* 583

ALLOCATION OF FAULT: JOINT TORTFEASORS IN COURT AND THE ONES WHO SHOULD BE . . . . *Cheri D. Green*
Michael K. Graves 647

AN EVALUATION OF THE MISSISSIPPI PRODUCTS LIABILITY ACT OF 1993 . . . . *Bobby Marzine Harges* 697

COMMENTS

OBTAINING A PATIENT'S CONSENT TO MEDICAL TREATMENT: INFORMED CONSENT UNDER MISSISSIPPI LAW . . . . *Walter Alan Davis*
John Graham Holaday 771

TORT REFORM AND THE MISSISSIPPI CONSTITUTION OF 1890 . . . . *R. Brittain Virden* 795

Index to Volume 63 823

The *Mississippi Law Journal* is pleased to announce
the newly elected Executive Editorial Board
for the 1994-95 school year:

Executive Board

Editor-in-Chief
William C. Walter

Assistant Editor
Brad Dillard

Business Manager & Managing Editor
Jeffrey A. Mannisto

Articles Editor
Oscar Thomas

Notes & Comments Editor
Steve Montagnet

Legislation Editor
James McCullough II

Symposium Editor
Sarah Frances Brent

Mississippi Cases Editor
Grant Monroe

Associate Editors

Articles
Brad Hathaway
Rick Pyper
Christy Crockett

Notes & Comments
Matt Powers
Charles Ferguson
Henry Dick III
Michael Parsons

Special Projects
Gary Rikard
Lee Rikard

Legislation
Tad McCraney
Mark Smith
Britt Virden

Mississippi Cases
Whit McKinley
Brett Robinson
Amy Jackson

FROM *PRUETT* TO *PRESLEY*: THE LONG AND WINDING ROAD TO ABROGATION OF COMMON LAW SOVEREIGN IMMUNITY IN MISSISSIPPI

David W. Case[*]

TABLE OF CONTENTS

I. Introduction 538
II. Abrogation of the Judicially-Created Doctrine 541
  A. Initial Assaults on Sovereign Immunity 541
  B. *Pruett v. City of Rosedale* 544
III. The Legislative Response to *Pruett* 547
  A. The Sovereign Immunity Act of 1984 547
  B. Restructuring the Act (1985-1992) 549
IV. The Mississippi Supreme Court Responds 553
  A. Growing Impatience 553
  B. *Presley v. Mississippi State Highway Comm'n* . . 556
V. The Legislative Response to *Presley* 563
  A. 1992 Special Session 563
  B. 1993 Amendments to Sovereign Immunity Act . 564
VI. What is the Future for Governmental Immunity in Mississippi? 567
  A. Prospective Application of *Presley* 568
  B. Retroactive Legislation 574
  C. The Legislative Policy of Sovereign Immunity . 578
VII. Conclusion 580

---

[*] B.A. 1985, J.D. 1988, University of Mississippi; LL.M. 1993, Columbia University; Law Clerk to Judge Rhesa H. Barksdale, United States Court of Appeals for the Fifth Circuit, 1991-92; Law Clerk to Magistrate Judge James C. Sumner, United States District Court for the Southern District of Mississippi, 1993 to present. This article is solely representative of the author's views, and should not be considered reflective of the views of his present employer.

The longest part of the journey is said to be
the passing of the gate.[1]

I. INTRODUCTION

As has been well chronicled by previous commentators,[2] *Pruett v. City of Rosedale*,[3] decided in 1982, represented Mississippi's first forward step in its journey toward abrogation of the common law immunity from tort liability once enjoyed by the state and its political subdivisions. With *Pruett*'s reversal of over a century of sovereign immunity jurisprudence,[4] Mississippi became the 45th state to either abolish, or limit, the judicially-created doctrine.[5] The landmark decision fostered optimism that the Mississippi Legislature would soon respond with a comprehensive scheme for citizens to obtain access to remedies in tort for injuries caused by various government activities. Indeed, the *Pruett* court's unanimous expectation was that the entire journey to abrogation of the common law sovereign immunity doctrine would take no longer than two years.[6]

Initial optimism eventually gave way to frustration. The resulting enactment of the Mississippi Sovereign Immunity Act of 1984[7] effectively restored sovereign immunity as the public policy of the state.[8] Moreover, although the Act also included a waiver of that immunity and carved out selected areas of governmental liability in tort, the Legislature mandated that the waiver would not take effect until the following year.[9] In the interim, the Legislature decreed that tort claims against the state and its political subdivisions would continue to be governed by sovereign immunity case law which existed prior to *Pruett*.[10] Notwithstanding the enactment of this legislative scheme, including numerous subsequent amendments, however, the Act did not take effect the following year, nor did it take effect during the next decade. Instead, what followed was an annual succession of statutes extending the Act's effective date to the following year. Each yearly extension was inevitably accompanied by a renewal of the legislative command that pre-*Pruett* immunity law would continue to govern tort claims against state government.

---

[1] MARCUS TERENTIUS VARRO, (116-27 B.C.), *On Agriculture [De Re Rustica]*, bk. I, ii, 2.

[2] *See, e.g.,* William A. Mayhew, *The Abrogation of Sovereign Immunity in Mississippi: The Legislative Problem*, 3 MISS. C. L. REV. 209 (1983); Owen T. Palmer, Jr., *The History and Future of Sovereign Immunity for Mississippi School Districts*, 58 MISS. L.J. 275 (1988).

[3] 421 So. 2d 1046 (Miss. 1982) (en banc).

[4] *See* Mayhew, *supra* note 2, at 211 n.11.

[5] *Id.* at 209.

[6] *See Pruett*, 421 So.2d at 1052. Recognizing the legislative dilemma inherent in its ruling, the court delayed the effective date of its opinion until July 1, 1984, giving the state legislature at least two sessions to prepare for abolition of the judicial doctrine of sovereign immunity. *Id.*

[7] Sovereign Immunities Act, 1984 Miss. Laws ch. 495 (codified at MISS. CODE ANN. § 11-46-1 to -21 (Supp. 1984)). Although the Legislature did not give this Act an official title, it has commonly been referred to as the Sovereign Immunity Act of 1984, or as

The Mississippi Legislature's annual refusal to allow *Pruett*'s mandate to take effect continued unabated until 1992. That year, apparently having finally lost patience with legislative inaction, the Mississippi Supreme Court again took the initiative in *Presley v. Mississippi State Highway Commission*.[11] The *Presley* court declared unconstitutional, primarily as violative of the doctrine of separation of powers, that portion of the Sovereign Immunity Act requiring the courts to apply pre-*Pruett* case law to claims that arose prior to the Act's effective date.[12] Simply put, the court in *Presley* made it plain that the state constitution prevented the Legislature compelling judicial application of case law that the Mississippi Supreme Court had clearly overruled in *Pruett*.

---

simply the 1984 Immunity Act. Starnes v. City of Vardaman, 580 So. 2d 733, 735 n.2 (Miss. 1991).

[8] *See* 1984 Miss. Laws ch. 495, § 2 (codified at MISS. CODE ANN. § 11-46-3 (Supp. 1984)).

[9] *Id.* § 4.

[10] *Id.*

[11] 608 So. 2d 1288 (Miss. 1992) (en banc).

[12] *Presley*, 608 So. 2d at 1294-96.

In stark contrast to the sluggish legislative response to *Pruett*, *Presley* elicited an immediate reaction. Less than three weeks following the decision,[13] Governor Kirk Fordice called a special session of the Mississippi Legislature to address the loss of immunity resulting from *Presley*'s removal of the pre-*Pruett* common law immunity shield.[14] The Legislature adopted temporary legislation addressing tort immunity, including the repeal of the Sovereign Immunity Act's requirement that claims continue to be governed by pre-*Pruett* case law.[15] The following year, the Legislature enacted permanent and more sweeping changes to the Act, including the creation of the Mississippi Tort Claims Board.[16] Perhaps most importantly, however, the 1993 amendments to the Act allowed the legislative waiver of sovereign immunity first enacted in 1984 to finally take effect.[17] For the first time since the journey began in *Pruett*, the judicially-created common law doctrine of sovereign immunity had been replaced by a comprehensive legislative scheme overseeing governmental tort liability.

The purpose of this Article is to provide an overview of the long and complex struggle to abrogate the court-created sovereign immunity doctrine in Mississippi. This review will include the decade-long effort of the judicial branch to overturn a doctrine it considered to be against modern public policy, while at the same time acknowledging the authority of the legislative branch to determine and define the public policy of the state. This Article will also canvass the slow evolution of the Sovereign Immunity Act of 1984, including an examination of the current legislative scheme for governmental tort liability established by the Act's 1993 amendments. Finally, this Article will briefly consider the possible future of sovereign immunity in Mississippi, focusing primarily upon potential judicial challenges to the current legislative scheme left open following the court's decision in *Presley*.

---

[13] *Id.* The supreme court decided *Presley* on August 31, 1992. The court subsequently denied rehearing on December 3, 1992. *Id.* at 1288.

[14] *See* Proclamation by the Governor to the Members of the Legislature, *reprinted in* JOURNAL OF THE SENATE OF THE STATE OF MISSISSIPPI, 1992 FIRST EXTRAORDINARY SESSION 5-7 (1992), *and reprinted in* JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF MISSISSIPPI, 1992 FIRST EXTRAORDINARY SESSION 1-2 (1992). The special legislative session was held on September 16, 1992.

[15] *See* Act of Sept. 16, 1992, ch. 3, § 2 (1993 Miss. Laws 4 (Extraordinary Session)) (repealing § 11-46-6 of the Mississippi Code).

[16] *See* Act of Apr. 1, 1993, 1993 Miss. Laws ch. 476 (codified at MISS. CODE ANN. §§ 11-46-1 *et seq.* (Supp. 1993)).

[17] *See* MISS. CODE ANN. § 11-46-5 (Supp. 1993).

II. ABROGATION OF THE JUDICIALLY-CREATED DOCTRINE

A. *Initial Assaults on Sovereign Immunity*

Simply stated, the concept of sovereign immunity is that government may not be sued unless it has first consented to be sued.[18] As explained by Justice Holmes, "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[19] The court-created doctrine is believed to derive from the 1788 English decision of *Russell v. Men of Devon*.[20] The doctrine's subsequent acceptance in the United States is traced to its initial application in the 1812 Massachusetts case of *Mower v. Leicester*.[21] Sovereign immunity became firmly ingrained in American law when, in 1821, Chief Justice Marshall stated that "no suit can be commenced or prosecuted against the United States" without its consent in *Cohens v. Virginia.*[22]

---

[18] *See* Davis v. Little, 362 So. 2d 642, 643 (Miss. 1978) (stating sovereign immunity is "that doctrine under which the sovereign, be it country, state, county or municipality may not be sued without its consent"). For an historical review of state and federal immunity, see Daniel C. Kramer, *The Governmental Tort Immunity Doctrine in the United States 1790-1955*, 1966 U. ILL. L.F. 795, 796-810.

[19] Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907). For early criticism of the doctrine, see Edwin M. Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924); Edwin M. Borchard, *Governmental Responsibility in Tort: VII*, 28 COLUM. L. REV. 577, 734 (1928); James D. Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations*, 16 OR. L. REV. 250 (1937).

[20] 100 Eng. Rep. 359 (K.B. 1788). *See* Jones v. Knight, 373 So. 2d 254, 259 (Miss. 1979) (en banc) (Bowling, J., dissenting), *overruled by* Pruett v. City of Rosedale, 421 So. 2d 1046 (Miss. 1982); McCall by Andrews v. Batson, 329 S.E.2d 741, 746 (S.C. 1985) (Chandler, J., concurring).

[21] 9 Mass. 247 (1812). *See Jones*, 373 So. 2d at 259 (Bowling, J., dissenting); *Batson*, 329 S.E.2d at 746 (Chandler, J., concurring).

Although the initial reference to sovereign immunity in Mississippi occurred in 1844,[23] the first judicial application of the doctrine came in 1852 when, in *Anderson v. State*,[24] the Mississippi Supreme Court ruled that a county could not be sued in the absence of an authorizing statute.[25] Twenty-five years later, in *Brabham v. Board of Supervisors of Hinds County*,[26] the supreme court launched a lengthy line of Mississippi cases which continued to recognize and enforce sovereign immunity in favor of the state and local governments.[27]

The decline of sovereign immunity began in 1957 when the Supreme Court of Florida became the first state court to judicially abolish the doctrine.[28] In Mississippi, however, the first hints that the doctrine should be abolished did not come until twenty years later in *Berry v. Hinds County*.[29] Although noting that several states had previously abrogated the judicial doctrine of sovereign immunity, the *Berry* court declined to follow suit.[30] "We are of the opinion . . . that the legislature is in the better position to limit and restrict claims that can be asserted and to provide the ways and means for the paying of such claims . . . if it should see fit to do so."[31] The court observed that the federal courts had not abolished sovereign immunity by "judicial fiat," but had, instead, "exercised the proper judicial self-restraint and waited for Congress" to enact the Federal Tort Claims Act.[32] Notwithstanding its stated view that the Legislature was the appropriate entity to resolve the issue, the *Berry* court also emphasized that "the courts, as well as the legislature, have the undoubted right to abrogate the doctrine of governmental immunity."[33]

---

[22] 19 U.S. (6 Wheat.) 264, 411-12 (1821). *See* Cindi P. Moreland, Note, *Torts - Immunity - Sovereign Immunity is Unavailable as a Defense in Tort Actions Against the State or its Political Subdivisions*, 53 MISS. L.J. 227, 227 (1983).

[23] *See* County of Yalobusha v. Carbry, 11 Miss. 529, 552 (1844) (questioning whether cause of action against county could be maintained in absence of authorizing statute); *see also* Mayhew, *supra* note 2, at 211.

[24] 23 Miss. 459 (1852).

[25] *Anderson*, 23 Miss. at 474. *See* Mayhew, *supra* note 2, at 211.

[26] 54 Miss. 363 (1877).

[27] *See* Mayhew, *supra* note 2, at 211 n.11; Pruett v. City of Rosedale, 421 So. 2d 1046, 1052-53 (Miss. 1982) (en banc) (listing cases overruled by *Pruett*).

[28] *See* Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957); *Jones*, 373 So. 2d at 260 (Bowling, J., dissenting); *Batson*, 329 S.E.2d at 746 (Chandler, J., concurring); Moreland, *supra* note 22, at 230. *See generally* William A. Olson, *Governmental Immunity from Tort Liability - Two Decades of Decline: 1959-1979*, 31 BAYLOR L. REV. 485, 489-90 (1979).

[29] 344 So. 2d 146 (Miss. 1977), *overruled by* Pruett v. City of Rosedale, 421 So. 2d 1046 (Miss. 1982). For an early criticism of the doctrine in Mississippi, see Alan E. Michel & John P. McLaurin, III, Comment, *A Case for the Abrogation of Municipal Tort Immunity in Mississippi*, 41 MISS. L.J. 289 (1970).

[30] *Berry*, 344 So. 2d at 147, 151.

Two years later, in *Jones v. Knight*,[34] the Mississippi Supreme Court reaffirmed its view that abrogation of sovereign immunity should be accomplished by the Legislature.[35] However, for the first time, members of the court clearly signaled that judicial patience in waiting for the Legislature to act would not be unlimited.[36] In a forceful dissent, Justice Bowling, joined by Chief Justice Patterson, advocated immediate judicial abrogation of sovereign immunity.[37] Although the opinion in *Jones* commanded a 6-2 majority,[38] Justice Bowling's dissent distinctly foreshadowed the majority opinion he would author only three years later in *Pruett*, in which the Mississippi Supreme Court would sharply reverse course on the question of sovereign immunity.

---

[31] *Id.* at 151.

[32] *Id.* at 150. For a recent discussion of sovereign immunity in the context of the Federal Tort Claims Act, see Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529 (1992).

[33] *Berry*, 344 So. 2d at 151; *cf.* Anderson v. Vanderslice, 126 So. 2d 522, 523 (Miss. 1961) (stating that any modification of sovereign immunity should be left to legislative branch, which is in best position to thoroughly consider doctrine).

[34] 373 So. 2d 254 (Miss. 1979).

[35] *Jones*, 373 So. 2d at 257; *see* M. Elizabeth Bourland, Note, *Torts - Survival of the Doctrine of Sovereign Immunity in Mississippi:* Jones v. Knight, 1 MISS. C. L. REV. 463, 467 (1980).

[36] *See* Bourland, *supra* note 35, at 467.

[37] *See Jones*, 373 So. 2d at 257-67 (Bowling, J., dissenting); *see also* Nathan D. Clark, Project, *1979 Mississippi Supreme Court Review-Torts*, 50 MISS. L.J. 887, 889-91 (1979) (summarizing Justice Bowling's arguments in *Jones* favoring judicial abrogation of sovereign immunity).

[38] *Jones*, 373 So. 2d at 257. Justice Coffer did not take part in the decision. *Id.*

B. Pruett v. City of Rosedale

Sovereign immunity has deep roots in Mississippi jurisprudence.[39] Accordingly, the Mississippi Supreme Court's swiftness in abrogating the doctrine only three years following the first contradictory voices in *Jones* was, to say the least, surprising.[40] By 1982, however, three new justices had joined the court.[41] Their votes, if combined with those of the *Jones* dissenters, had the clear potential to command a new majority in the court's sovereign immunity debate. As it turned out, a bare majority was unnecessary as *Pruett* was decided by a unanimous court. It is possible, however, that the four members of the *Jones* majority who switched positions in *Pruett* believed that, in the light of this turning tide, it was important that an undivided court accomplish such a stunning reversal of over a century of precedent.[42]

In reaching its decision, the *Pruett* court's predominate focus was on the vast majority of states that had previously abrogated the judicially-created doctrine of sovereign immunity.[43] The court borrowed heavily from court decisions of those states in noting that the concept of sovereign immunity was derived from an antiquated legal maxim that no longer comported with basic concepts of fairness in a modern society.[44] Indeed, a principal concern raised in Justice Bowling's dissent in *Jones* was whether Mississippi would be the last state to abrogate the judicial doctrine.[45] With its decision in *Pruett*, the

---

[39] *See supra* notes 23 through 27 and accompanying text.

[40] *See* Ronald G. Marquardt, *The King Can Do Wrong - Maybe: Abolition of Court-Imposed Sovereign Immunity for Nondiscretionary Negligent Acts*, 3 MISS. C. L. REV. 103, 105-06 (1982).

[41] The three new members of the court were Justices Hawkins, Dan Lee and Prather.

[42] The four remaining members of the *Jones* majority who reversed their positions in *Pruett* were Justices Sugg, Walker, Broom, and Roy Noble Lee.

[43] *See Pruett*, 421 So. 2d at 1047. The court noted that Mississippi was one of only six states that had not taken any action on this question. *Id.*

[44] *Id.* at 1048-51.

[45] *See Jones*, 373 So. 2d at 257 (Bowling, J., dissenting).

Mississippi Supreme Court was certainly following an overwhelming trend.[46]

Nonetheless, *Pruett*'s abrogation of the judicial doctrine was by no means absolute. The court noted that "[a]lthough absolute governmental immunity from tort liability has lost favor with the courts, there is still considerable support for shielding certain governmental activities from liability."[47] Concerned that eliminating immunity for legislative, judicial, and executive acts would "result in over-cautiousness on the part of officials who carry out such responsibilities," the court left intact the "historical and well-recognized principle of immunity" granted state and local governments and their public officers regarding the exercise of such discretionary governmental functions.[48] In all other respects, however, *Pruett* declared the judicially created doctrine abolished, overruling all previous cases upholding the doctrine.[49]

Despite pronouncing sovereign immunity a judicial creation that the judiciary was necessarily free to abrogate, the *Pruett* court also carefully noted that, at heart, the issue was one of public policy that should be controlled by the Legislature.[50] The court noted:

> [I]n our opinion, the control and policing of sovereign immunity is a legislative responsibility and not that of the judiciary. The sovereign immunity doctrine is a creature of the judiciary. We are of the opinion that it should not be so; but that as said above, the details of handling the question is legislative rather than judicial. As has been said by many of the states' highest courts, the judicial branch is leaving the matter to the legislative branch.[51]

The *Pruett* court also noted that, similarly, when it abrogated the judicial doctrine of charitable immunity in *Mississippi*

---

[46] *See Pruett*, 421 So. 2d at 1047.
[47] *Id.* at 1051.
[48] *Id.* at 1052.
[49] *Id.* at 1052-53.
[50] *Id.* at 1047.
[51] *Pruett*, 421 So. 2d at 1047.

Baptist Hospital v. Holmes,[52] it had stressed that "the functions of creating a public policy is primarily one to be exercised by the legislature and not by the courts."[53] Therefore, even while abolishing the judicial doctrine, *Pruett* clearly emphasized that responsibility for the existence *vel non* of a public policy controlling the extent to which individuals could pursue tort claims against state and local government properly rested with the legislative branch.[54]

From a pragmatic standpoint, however, the *Pruett* court acknowledged that such an immediate and, indeed, unexpected shift in responsibility over the control and supervision of governmental immunity would find the Legislature completely unprepared.[55] The court noted that there were "many conditions that the legislature may consider," and that the legislative problems presented by its opinion would "take time to solve."[56] For that reason, the court ruled that the judicial doctrine would be abolished prospectively only, and that the mandate of the opinion would not take effect until July 1, 1984.[57] Any claims accruing prior to that date would, therefore, still be controlled by the common law doctrine. By the time *Pruett*'s mandate became effective, however, two legislative sessions would have passed, which, as the court noted, would give state and local governmental entities, and the Legislature, sufficient time to adjust.[58] After more than a century of primarily judicial control, the future of sovereign immunity in Mississippi had finally and unequivocally been entrusted to the hands of the Legislature.

---

[52] 55 So. 2d 142 (Miss. 1951).

[53] *Pruett*, 421 So. 2d at 1051 (quoting *Holmes*, 55 So. 2d at 152). When, in 1988, the Mississippi Supreme Court struck down the judicially-created doctrine of interspousal immunity, it similarly highlighted the ability of the legislative branch to deal with the question as a matter of public policy. Burns v. Burns, 518 So. 2d 1205, 1211 (Miss. 1988) (quoting Freehe v. Freehe, 500 P.2d 771, 773 (Wash. 1972)).

[54] *See Pruett*, 421 So. 2d at 1051; *see also* Marquardt, *supra* note 40, at 109 (suggesting that *Pruett* court was in fact "shedding power" rather than taking action that legislature had been reluctant to take).

[55] *See Pruett*, 421 So. 2d at 1052.

[56] *Id.*

[57] *Id.*

[58] *Id.*

III. THE LEGISLATIVE RESPONSE TO *PRUETT*

A. *The Sovereign Immunity Act of 1984*

The Mississippi Legislature's first opportunity to respond to *Pruett*, the 1983 Regular Session, passed without the enactment of a comprehensive scheme to regulate governmental tort liability.[59] Although a bill partially responding to *Pruett* passed the House of Representatives, it was not enacted by the full Legislature.[60]

The Legislature's initial response to the mandate of *Pruett* came instead during the 1984 Regular Session, with the enactment of the Mississippi Sovereign Immunity Act of 1984.[61] The Act contained a legislative "declaration" that, as a matter of public policy, the state and its departments and agencies would be generally immune from tort liability from and after July 1, 1985, as would the state's political subdivisions from and after October 1, 1985.[62] Further, the Act provided that, notwithstanding the foregoing grant of immunity, the immunity of the state and its political subdivisions would be waived for claims arising out of the torts of governmental entities and their employees acting within the course and scope of their employment.[63] As with the declaration of immunity, this waiver was not effective until from and after July 1 and October 1, 1985, respectively.[64]

The Legislature limited the maximum waiver of immunity to $500,000 for all claims arising out of a single occurrence.[65]

---

[59] Mayhew, *supra* note 2, at 222.

[60] *Id.* at 222-24 (discussing specifics of House Bill No. 904 as originally introduced and as amended by House of Representatives).

[61] 1984 Miss. Laws ch. 495 (codified at MISS. CODE ANN. § 11-46-1 to -21 (Supp. 1984)).

[62] *Id.* § 2.

[63] *Id.* § 3.

[64] *Id.*

[65] *Id.* § 9(1).

No judgment under this waiver could include an award of punitive damages, pre-judgment interest, or attorney's fees, unless attorney's fees were specifically authorized by law.[66] The waiver provision also expressly provided that the state did not waive its immunity from suit in federal court as guaranteed by the Eleventh Amendment to the United States Constitution.[67] The legislative scheme also set forth an extensive laundry list of specific exemptions for acts or omissions of governmental entities to which the waiver of liability would not apply.[68]

The Legislature designated the State Fiscal Management Board as the governmental entity responsible for administering the Act,[69] including managing the Tort Claims Fund created by the Act's provisions.[70] The Act also established a statute of limitations requiring commencement of a claim within two years after accrual of a cause of action.[71] At the time of the Act's passage, however, the possibility that a cause of action would accrue under its provisions was exceedingly remote. In what would eventually prove to be the most controversial stipulation, the Legislature mandated that the Act's provisions would apply only to claims accruing on or after July 1, 1985, as to the state, and on or after October 1, 1985, as to political subdivisions.[72] Claims accruing prior to those dates were to be governed by the common law in regards to sovereign immunity as it had existed "immediately prior" to the court's decision in *Pruett.*[73]

---

[66] 1984 Miss. Laws ch. 495, § 9(2).

[67] *Id.* § 3(4). For a recent discussion of state sovereign immunity issues under the Eleventh Amendment, see Victoria L. Calkins, Note, *State Sovereign Immunity After* Pennsylvania v. Union Gas Co.: *The Demise of the Eleventh Amendment*, 32 WM. & MARY L. REV. 439 (1991); Alex E. Rogers, Note, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 COLUM. L. REV. 1243 (1992).

[68] 1984 Miss. Laws ch. 495, § 6. For a review of the myriad legislative approaches to waiver of immunity while still providing for specific immune activities, see Scott J. Borth, Comment, *Municipal Tort Liability for Erroneous Issuance of Building Permits: A National Survey*, 58 WASH. L. REV. 537, 540-46 (1983).

[69] 1984 Miss. Laws, ch. 495, § 11.

[70] *Id.* § 10(1).

[71] *Id.* § 7(2).

[72] *Id.* § 4.

The 1984 Act was clearly intended to be a temporary measure and, in fact, was scheduled for repeal from and after July 1, 1985, one year after its passage.[74] As one commentator noted, "The general consensus was that the legislature was attempting to provide, without extensive and exhaustive study, a measure that could serve as a starting point for consideration by the 1985 legislature."[75]

B. Restructuring the Act (1985-1992)

Although the 1984 Act did not finally take effect until 1993, the Legislature was not completely idle on the question of sovereign immunity during the intervening legislative sessions. Indeed, many important alterations and additions were made to the Act on virtually an annual basis. Notwithstanding the labor reflected by these numerous amendments, however, during the years between 1985 and 1992, the Legislature exhibited an unceasing vigilance against allowing the provisions of the Sovereign Immunity Act to become law.

The original legislative scheme was reenacted during the 1985 Regular Session with virtually no changes,[76] and the effective dates were extended to July 1, 1986, for the state, and October 1, 1986, for political subdivisions.[77] In 1986, the Legislature reenacted the statutory design without modification, except for again delaying the Act's implementation for another year.[78]

---

[73] *Id.*

[74] *See* text following codified provisions of Sovereign Immunity Act in MISS. CODE ANN. § 11-46-1 to -19 (Supp. 1984) (providing that legislation was "eff[ective] from and after July 1, 1984, and shall stand repealed from and after July 1, 1985").

[75] Palmer, *supra* note 2, at 288.

[76] Act of Apr. 5, 1985, ch. 474, 1985 Miss. Laws 395 (codified at MISS. CODE ANN. § 11-46-1 to -21 (Supp. 1985)). The Legislature did add to the provisions by authorizing two or more governmental entities to enter into pooling agreements regarding tort liability and the purchase of liability insurance. *Id.* sec. 9, § 5.

[77] *Id.* sec. 12.

[78] Act of Apr. 9, 1986, 1986 Miss. Laws ch. 438 (codified at MISS. CODE ANN. § 11-46-1 to -21 (Supp. 1986)).

The first significant amendments to the 1984 Act were produced during the 1987 Regular Session.[79] Most importantly, the Act was amended to provide protection for employees of the state and its political subdivisions for acts or omissions occurring within the course and scope of the employee's duties.[80] This protection included mandating a responsibility upon every governmental entity to provide a defense to its employees and to pay any judgment against an employee concerning claims arising out of employment-related activities.[81] Furthermore, governmental entities were specifically precluded from seeking contribution or indemnification for legal fees and expenses from their employees, unless a court found that the act or omission in question was outside the course and scope of employment.[82] The Legislature's decision to protect governmental employees in this manner resolved a severe criticism of the original legislative scheme.[83]

The 1987 amendments also established a graduated schedule regarding the maximum waiver of liability under the Act. For causes of action accruing between July 1, 1988, and July 1, 1989, the limit of liability was set at $25,000.[84] For claims accruing between July 1, 1989, and July 1, 1990, the liability limit was increased to $200,000.[85] The maximum liability under the Act remained at $500,000 for all claims accruing on or after July 1, 1990.[86] As in previous years, however, the Legislature extended the effective date of the Act for another year, and continued the requirement that pre-*Pruett* law govern claims arising prior to the Act's effective date.[87]

---

[79] Act of Apr. 15, 1987, 1987 Miss. Laws ch. 483 (codified at MISS. CODE ANN. § 11-46-1 to -21. (Supp. 1987)).

[80] *Id.* sec. 4, § 2.

[81] *Id.* sec. 4, § 3.

[82] *Id.* sec. 4, § 5.

[83] *See* Palmer, *supra* note 2, at 288.

[84] 1987 Miss. Laws ch. 483, sec. 8, § 1(a).

[85] *Id.* sec. 8, § 1(b).

[86] Sovereign Immunity Act, 1984 Miss. Laws ch. 495, sec. 8, § 1(c).

[87] *Id.* sec. 3 (adding § 11-4-6 to the Mississippi Code).

The 1988 Regular Session engendered several modest changes to the Act.[88] For example, physicians under contract to provide health services with the State Board of Health or the State Board of Mental Health were included within the Act's definition of a governmental employee.[89] The statute of limitations provision also was amended to require the filing of a notice of claim with the chief executive officer of the appropriate governmental entity at least ninety days prior to maintaining any court action on that claim.[90] Additionally, the Legislature substantially modified the provisions concerning the creation of the Tort Claims Fund and liability insurance.[91] Once again, however, implementation of the Act was delayed for another year.[92]

In 1989, the Legislature reenacted the general provisions of the Act essentially without adjustment,[93] and also extended the Act's effective dates for another year.[94] In 1990, however, the Legislature's reenactment of the regulatory scheme included a new provision which waived sovereign immunity to the extent that any governmental entity had in effect liability insurance to cover wrongful or tortious acts of the entity or its employees.[95] The waiver was only to the extent of the policy limits of the applicable insurance.[96] No other modifications were made, and the Legislature again approved the annual extension of the Act's effective dates.[97]

---

[88] *See* Act of Apr. 25, 1988, 1988 Miss. Laws ch. 442; Act of Apr. 27, 1988, 1988 Miss. Laws ch. 479.

[89] 1988 Miss. Laws ch. 4790, sec. 2, § c.

[90] *Id.* sec. 3, § 1. The statute further provides:

> The notice of claim required by subsection (1) of this section shall be in writing, delivered in person or by registered or certified United States mail. Every notice of claim shall contain a short and plain statement of the facts upon which the claim is based, including the circumstances which brought about the injury, the extent of the injury, the time and place the injury occurred, the names of all persons known to be involved, the amount of money damages sought and the residence of the person making the claim at the time of the injury and at the time of filing the notice.

Id. sec. 3, § 2.

[91] *See* Palmer, *supra* note 2, at 290-93 (discussing modifications to § 11-46-47 of Mississippi Code made during 1898 Regular Session). *Compare* 1987 Miss. Laws ch. 483, sec. 9 *with* 1988 Miss. Laws ch. 479, sec. 4.

[92] MISS. CODE ANN. § 11-46-6 (Supp. 1988).

[93] *See* 1989 Miss. Laws ch. 537 (codified at MISS. CODE ANN. § 11-46-1 *et seq.* (Supp. 1989)). *But see* MISS. CODE ANN. § 11-46-17(2) (Supp. 1989) (authorizing Board of Trustees of State Institutions of Higher Learning to provide liability insurance for universities and employees).

[94] MISS. CODE ANN. § 11-46-6 (Supp. 1989).

The 1991 Regular Session produced no new amendments and effectuation of the Act was once more avoided.[98] During the 1992 Regular Session, the only significant amendment was to the graduated schedule regarding the maximum waiver of liability under the Act.[99] All claims accruing between July 1, 1993, and July 1, 1997, would be subject to a liability limit of $50,000.[100] After July 1, 1997, but before July 1, 2001, the maximum liability for claims arising out of a single occurrence would increase to $250,000.[101] The maximum liability under the Act continued to be $500,000 for all claims accruing on or after July 1, 2001.[102] Without fail, however, the Act's effective dates were methodically extended by the Legislature, and the requirement that claims continue to be governed by pre-*Pruett* case law remained set in concrete.[103]

Regardless of the extensive modifications to the 1984 Act produced during the eight subsequent legislative sessions, it did not appear in 1992 that Mississippi was significantly closer to the abrogation of common law sovereign immunity than it had been in 1982, when *Pruett* was decided. Although *Pruett*'s mandate had ostensibly taken effect on July 1, 1984, the Legislature had systematically continued to keep the common law as it had existed prior to *Pruett* alive through statutory edict. As such, the comprehensive statutory scheme regulating governmental tort liability, which had now existed for nine years, had never taken effect, and constituted little more than an annual academic exercise for the Legislature. This would soon change, however, as 1992 would see the Mississippi Supreme Court again seize the initiative in the sovereign immunity debate.

---

[95] 1990 Miss. Laws ch. 518, § 6 (codified at MISS. CODE ANN. § 11-46-16 (Supp. 1990)).

[96] MISS. CODE ANN. § 11-46-16(1) (Supp. 1990).

[97] MISS. CODE ANN. § 11-46-6 (Supp. 1990).

[98] *See* 1991 Miss. Laws ch. 618 (codified at MISS. CODE ANN. § 11-46-1, *et seq.* (Supp. 1991)).

[99] 1992 Miss. Laws ch. 491, § 2 (codified at MISS. CODE ANN. § 11-46-15 (Supp. 1992)).

[100] *Id.* sec 2, § 1(a).

[101] *Id.* sec 2, § 1(b).

[102] *Id.* sec 2, § 1(c).

[103] *Id.* sec 5.

IV. THE MISSISSIPPI SUPREME COURT RESPONDS

A. *Growing Impatience*

The first opportunity for the Mississippi Supreme Court to address the 1984 Sovereign Immunity Act did not come for several years following its passage. There were, however, many occasions for the court to reemphasize the prospective nature of the *Pruett* decision, and to apply the court-created doctrine of sovereign immunity to claims which accrued prior to July 1, 1984.[104] The court additionally had occasion to apply that portion of the judicial doctrine preserved by *Pruett*; that is, qualified immunity for those governmental officials performing discretionary public functions.[105]

In 1988, the first intersection between the holding of *Pruett* and the Sovereign Immunity Act's provisions occurred in *Grantham v. Mississippi Department of Corrections.*[106] Grantham's claims were based upon incidents which had occurred in February 1985, well after *Pruett*'s July 1, 1984, effective date.[107] The *Grantham* court acknowledged, however, that the 1984 Act required application of pre-*Pruett* case law to claims accruing prior to July 1, 1985, as to the state, or prior to October 1, 1985, as to political subdivisions.[108] Without further discussion, the court ruled that the sovereign immunity assertions of the state Parole Board and the Mississippi Department of Corrections regarding Grantham's claims would be governed by pre-*Pruett* case law and any statutory law in effect prior to July 1, 1985.[109] In *Strait v. Pat Harrison Waterway District*, rendered the same day as *Grantham*, the court again enforced the Legislature's command to apply pre-*Pruett* immunity law.[110]

---

[104] *See, e.g.*, McKay v. Boyd Constr. Co., 571 So. 2d 916, 920 (Miss. 1990); Marshall v. Chawla, 520 So. 2d 1374, 1375 (1988), *overruled by* Womble v. Singing River Hosp., 618 So. 2d 1252 (Miss. 1993); Region VII, Mental Health-Mental Retardation Ctr. v. Isaac, 523 So. 2d 1013, 1015 (1988); Joseph v. Tennessee Partners, Inc., 501 So. 2d 371, 374 (Miss. 1987), *overruled by* Churchill v. Pearl River Basin Dev. Dist., 619 So. 2d 900 (Miss. 1993); White v. City of Tupelo, 462 So. 2d 707, 709 (Miss. 1985); McGoldrick Oil Co. v. Greene County, 446 So. 2d 594, 595 (Miss. 1984).

[105] *See, e.g.*, State v. Lewis, 498 So. 2d 321, 322-23 (Miss. 1986); Robinson v. Indianola Mun. Separate Sch. Dist., 467 So. 2d 911, 915 (Miss. 1985); Hudson v. Rausa, 462 So. 2d 689, 693-94 (Miss. 1984), *overruled by* Womble v. Singing River Hosp., 618 So. 2d 1252 (Miss. 1993).

[106] 522 So. 2d 219 (Miss. 1988), *rev'd sub nom.* Sykes v. Grantham, 567 So. 2d 200 (Miss. 1990). For a detailed discussion of *Grantham*, see *1988 Mississippi Supreme Court Review*, 58 MISS. L.J. 655, 664-68 (1988).

The first significant post-*Pruett* attack on sovereign immunity came in *Richardson v. Rankin County School District*.[111] In *Richardson*, the plaintiff sought "total and final abandonment" of sovereign immunity, notwithstanding the Legislature's codification of pre-*Pruett* common law in the 1984 Act.[112] As had been noted by the trial court, however, *Pruett* did not find the doctrine of sovereign immunity to be unconstitutional.[113] To the contrary, *Pruett* "recognized . . . that it was the Legislature, not the judiciary, that had the duty and responsibility of controlling and policing sovereign immunity."[114] The *Richardson* court further found the intent of the Legislature in enacting the Sovereign Immunity Act to be clear; it granted general legislative immunity to the state and its political subdivisions.[115] As such, the court found that, absent a challenge to the constitutionality of the Act itself, the mere request that the court finally abolish sovereign immunity "infringes upon the policy making authority of the legislature, and this Court refrains from infringing upon this legislative prerogative."[116]

---

[107] *See Grantham*, 522 So. 2d at 222.

[108] *Id.* (quoting 1984 Miss. Laws ch. 495, § 4).

[109] *Id.*

[110] 523 So. 2d 36, 38 (Miss. 1988), *overruled by* Churchill v. Pearl River Dev. Dist., 619 So. 2d 900 (Miss. 1993). For a substantive discussion of *Strait*, see 1988 *Mississippi Supreme Court Review*, 58 MISS. L.J. 655, 668-72 (1988). *Accord* Webb v. County of Lincoln, 536 So. 2d 1356, 1359 (Miss. 1988) (reiterating Sovereign Immunity Act's directive to apply common law as it existed pre-*Pruett*).

[111] 540 So. 2d 5 (Miss. 1989).

[112] *Richardson*, 540 So. 2d at 6.

[113] *Id.* at 7.

[114] *Id.*

In *Starnes v. City of Vardaman*,[117] the court began to intimate a stronger measure of disquiet regarding the repeated postponement of the Sovereign Immunity Act's effective date. In *Starnes*, a municipality sued by a state prisoner injured on a community work detail asserted the Act's two-year statute of limitations as a defense.[118] The court noted, however, that the statute of limitations issue had been "exacerbated" by the Legislature's annual delay in effectuating the 1984 Act.[119] As a result, the court stressed that "the act - save only its reenactment of pre-*Pruett* immunity law - has been and remains law *in futuro*, law that has never acquired a present force."[120] Having never become operative, therefore, the court held that the two-year limitations period could not be enforced, and that the municipality's immunity defenses were governed by pre-*Pruett* law.[121] Ironically, the court noted that, although the city might have been immunized under one of the Act's inoperative exemptions from liability, the city had pointed to nothing in pre-*Pruett* immunity law which would provide a defense to the prisoner's claims.[122]

In the 1991 case of *Webb v. Jackson*,[123] the court was again asked to address the recurrent issue of whether sovereign immunity should be absolutely abolished. As in *Richardson*, the court again directed attention to the fact that, in response to *Pruett*'s abrogation of the judicial sovereign immunity doctrine, the Legislature had enacted a *legislative policy* of sovereign immunity.[124] Considering the issue in this light, the court "declined to usurp the authority given to the Legislature regarding policy making by abolishing sovereign immunity altogether."[125]

---

[115] *Id.* at 7-8.

[116] *Id.* at 9.

[117] 580 So. 2d 733 (Miss. 1991).

[118] *See Starnes*, 580 So. 2d at 736.

[119] *Id.* at 734.

[120] *Id.* at 735.

[121] *Id.* at 736.

[122] *Id.* at 736-37 (citing MISS. CODE ANN. § 11-46-9(p) (Supp. 1990)).

[123] 583 So. 2d 946 (Miss. 1991).

Reminiscent of *Jones v. Knight*,[126] however, one member of the court took the opportunity presented by *Webb* to signal that judicial patience in waiting for affirmative action from the Legislature was wearing thin. In a sharply worded dissent, Justice McRae delivered the first shot across the legislative bow regarding the Sovereign Immunity Act's annual renewal of the common law immunity doctrine previously rejected by the court in *Pruett*.[127] Noting the nearly ten years that had passed since *Pruett*, Justice McRae urged immediate action by the court to remedy the Legislature's failure to correct an inefficient and inequitable public policy.[128] As with Justice Bowling's *Jones* dissent a dozen years previous, Justice McRae's dissent in *Webb* clearly presaged the court's next undertaking in the sovereign immunity debate, which would come the following year in *Presley*.

B. *Presley v. Mississippi State Highway Commission*

In stark contrast to the unanimity of *Pruett*,[129] the judgment in *Presley* was rendered by an extremely fractured court. *Presley*, in fact, produced five separate opinions among the justices, resulting in a number of diverse coalitions. This inability to reach a consensus would ultimately prove crucial, as it precluded a majority decision on one of the more critical issues faced by the court in *Presley*.

---

[124] *Webb*, 583 So. 2d at 951-52 (citing Webb v. County of Lincoln, 536 So. 2d 1356, 1358 (Miss. 1988)).

[125] *Id.* at 952 (citing Richardson v. Rankin County Sch. Dist., 540 So. 2d 5, 9 (Miss. 1990)).

[126] *See supra* notes 36-38 and accompanying text.

[127] *See Webb*, 583 So. 2d at 954 (McRae, J., dissenting).

[128] *Id.*

[129] *See supra* notes 40-42 and accompanying text.

The first of two separate opinions for the court was authored by Justice Hawkins, one of the four members of the *Presley* court who also participated in *Pruett.*[130] Initially, Justice Hawkins noted that, although the court had addressed and applied the Sovereign Immunity Act on several previous occasions,[131] *Presley* represented the first challenge to the Act's constitutionality.[132] Nevertheless, Justice Hawkins was also careful to identify the extremely narrow issue before the court in *Presley*—that is, the constitutionality *vel non* of the legislative mandate requiring courts to apply pre-*Pruett* law in deciding issues of sovereign immunity.[133]

Before addressing this issue, however, Justice Hawkins' opinion revisited the principles resulting in the *Pruett* court's decision to abrogate the judicially-created sovereign immunity doctrine.[134] Included within this review was the clear reaffirmation that, notwithstanding its resounding annulment of the century-old common law doctrine, *Pruett*'s primary purpose had been to shift responsibility for the public policy of sovereign immunity from the judiciary to the legislative branch.[135] As emphasized by Justice Hawkins in *Presley*:

> There are many sound reasons why an immunity granted the state or political subdivision should come solely from Legislative enactment. Sovereign immunity is a matter of public policy and our Legislature determines what is in the public interest. In the granting or withholding of sovereign immunity, there are gradations, competing interests to balance, that of fairness to our citizens and proper functions of state government, . . . which can only be accomplished by statutory law.[136]

---

[130] The other three were Justices Dan Lee, Roy Noble Lee, and Prather.

[131] *See supra* notes 106-125 and accompanying text.

[132] Presley v. Mississippi State Highway Comm'n, 608 So. 2d 1288, 1290 (Miss. 1992) (en banc).

[133] *Presley*, 608 So. 2d at 1294.

[134] *Id.* at 1291.

[135] *Id.*

[136] *Id.* (citations omitted).

Indeed, these principles evoked the strongest measure of support in *Presley*, with seven of the nine justices concurring in this portion of Justice Hawkins' opinion.[137]

The segment of Justice Hawkins' opinion considering the constitutional issue, however, received support from only a bare majority of the court.[138] Nonetheless, the court held that the Sovereign Immunity Act's requirement that the courts continue to apply the common law sovereign immunity doctrine as it existed prior to *Pruett* violated the separation of powers provision of the Mississippi Constitution.[139] Three primary justifications were offered to support this conclusion. First, the court noted that the legislative mandate required application of case law specifically overruled in *Pruett*.[140] Second, because the statute provided no statement of "whether, how or in what manner" to apply sovereign immunity, the simple command to apply "case law" came precariously close to an unlawful delegation of authority to the court to legislate on this subject.[141]

Finally, and the concern stated to be "fatal to [the statute's] validity," the Legislature had improperly restricted the judicial function by "freezing" the common law at a certain moment in time.[142] The court found that this constraint impinged upon the judiciary's "sole responsibility of pronouncing the common law. 'There is no such thing as construction of the common law. We (the court) do not interpret it; we declare it; we say what it is.'"[143] Accordingly, the court found that, to the extent it restricted the judicial power to create and apply common law, the Sovereign Immunity Act violated the state constitutional provision regarding separation of powers.[144]

---

[137] *Id.* at 1301. Justices Hawkins, Dan M. Lee, Robertson, Sullivan, Pittman, Banks, and McRae concurred as to this aspect of the court's decision. *Id.*

[138] *Presley*, 608 So. 2d at 1301. Justices Hawkins, Sullivan, Pittman, Banks, and McRae concurred in Part I(C) of the court's opinion. *Id.*

[139] *Id.* at 1294-96; *see* MISS. CONST. art. 1, § 1 ("The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.").

[140] *Presley*, 608 So. 2d at 1294. The court noted that, although *Pruett* held that "sovereign immunity was a matter to be determined solely by the Legislature, *judicial* sovereign immunity was abolished also because the common law does not grant courts the authority to make gradations and exceptions which can only be made by statute." *Id.*

[141] *Id.*

[142] *Id.* at 1295.

The second opinion for the court in *Presley* was composed by Justice Banks.[145] In the initial portion of his opinion, six of the nine justices[146] agreed that the Sovereign Immunity Act's command to apply pre-*Pruett* immunity law further violated the state constitutional prohibition against reviving an entire body of law by reference only.[147] The court found the legislative mandate to apply "case law governing sovereign immunity as it existed immediately prior to the decision in the case of *Pruett v. City of Rosedale*" to be an obvious attempt to revive an entire body of common law on this particular subject by reference.[148]

In the second portion of Justice Banks' opinion, the court struggled with the "essential question" of whether the rule announced in *Presley* should apply retroactively or prospectively.[149] Indeed, it would be difficult to overstate the critical importance of this issue. As noted by Justice Banks:

> For the past eight years, the State and its political subdivisions have relied upon a legislative response to our

---

[143] *Id.* (quoting Churchill v. Pacific Imp. Co., 31 P. 560, 561 (Cal. 1892)). Quoting from 2 THOMAS M. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 191 (8th ed. 1927), the *Presley* court further noted:

> If the legislature would prescribe a different rule for the future from that which the courts enforce, it must be done by statute, and cannot be done by a mandate to the courts, which leaves the law unchanged, but seeks to compel the courts to construe and apply it, not according to judicial, but according to the legislative judgment.

Presley, 608 So. 2d at 1296.

[144] *Presley*, 608 So. 2d at 1296.

[145] *Id.*

[146] *Id.* at 1301. Justices Hawkins, Dan Lee, Banks, Robertson, Sullivan and Pittman concurred in this portion of the court's decision. *Id.*

[147] *Id.* at 1296-98. The Mississippi Constitution provides that "[n]o law shall be revived or amended by reference to its title only, but the section or sections, as amended or revived, shall be inserted at length." MISS. CONST. art. 4, § 61.

[148] *Presley*, 608 So. 2d at 1298 (quoting MISS. CODE ANN. § 11-46-6 (Supp. 1987)).

[149] *Id.* at 1299.

> declaration in *Pruett* thought sufficient to immunize the public treasury. It is logical to assume that alternative provisions and contingency planning to protect that treasury have been foregone. To hold now that no immunity has existed since 1984 poses fiscally disastrous consequences to our state and its political subdivisions.[150]

Accordingly, in a four-to-three decision, a plurality of the court concluded that *Presley* would be applied prospectively.[151] As such, the plurality announced that the court would continue to immunize the state from claims arising prior to August 31, 1992 (the date of *Presley*) by applying evolving standards of common law on a case-by-case basis.[152] The plurality further declared, however, that an exception to this extension of the common law sovereign immunity doctrine would exist where a governmental entity had protected itself by purchasing liability insurance.[153]

In a discursive dissent, Justice McRae, joined by Justices Hawkins and Sullivan, advocated complete retroactive application of *Presley*.[154] Because the court had declared invalid only the second sentence of the statute in question,[155] Justice McRae argued that the statute's first sentence, which mandated that the Sovereign Immunity Act's provisions would become effective the ensuing year, remained intact.[156] In a convoluted bit of reasoning, Justice McRae contended that removing the pre-*Pruett* immunity shield from each successive reenactment, while, at the same time, preserving the provisions concerning the Act's effective dates, served to allow "each year's Sovereign Immunity Act to go into effect on the specified effective date."[157] Justice McRae maintained, therefore, that every claim arising after July 1, or October 1, 1985, was now valid under the Act.[158] This logic, however, completely ignores the Legislature's annual repeal of each version of the statute effectuating the Act, and the corresponding enactment of a new statute delaying implementation of the Act until the following year.[159] Needless to say, a statute repealed by the Legislature cannot take effect the next year, or any other year. Moreover, the supreme court had previously recognized in *Starnes v. City of Vardaman*[160] that each successive reenactment served to ensure that the Sovereign Immunity Act would remain "law *in futuro*," never to acquire a present force.[161]

---

[150] *Id.* at 1298.

[151] *Id.* at 1298. As explained by the *Presley* plurality:

> [W]ithout doubt, the State and its political subdivisions have relied on their immunity under Miss. Code Ann. § 11-46-1 *et seq.* and conducted non-proprietary activities with knowledge of this immunity. This immunity was granted to the State and its subdivisions by the Legislature in response to *Pruett*. It therefore seems the only appropriate resolution of this case, in light of a new rule and its effect on old (and unsuspecting) parties, would be to apply this decision prospectively.

Id.

[152] *Id.* at 1301.

[153] *Presley*, 608 So. 2d at 1301 (citing McCall by Andrews v. Batson, 329 S.E.2d 741 (S.C. 1985)). The supreme court later clarified this exception to the prospective application of *Presley* as follows:

> In *Presley*, we held the legislative reestablishment of sovereign immunity ineffective as violative of the constitutional prohibition against reviving laws by reference. We limited the effect of the statute to "immunizing the State from claims arising thereafter to the extent that this court would do so applying the evolving standards of common law" and provided that abolition of sovereign immunity there declared is fully retroactive for governmental entities having obtained liability insurance covering the incident in question, to the extent of such insurance.

Lee County Bd. of Supervisors v. Fortune, 611 So. 2d 927, 930 (Miss. 1992).

---

[154] *See Presley*, 608 So. 2d at 1303 (McRae, J., dissenting).

[155] Justice McRae quoted the full text of the statute which provided:

> This chapter shall apply only to claims or causes of action arising from acts or omissions occurring on or after July 1, 1988, as to the state, and on or after October 1, 1988, as to political subdivisions. Claims or causes of action arising from acts or omissions occurring prior to July 1, 1988, as to the state, or prior to October 1, 1988, as to political subdivisions, shall not be affected by this chapter but shall continue to be governed by the case law governing sovereign immunity as it existed immediately prior to the decision in Pruett v. City of Rosedale, 421 So.2d 1046, and by the statutory law governing sovereign immunity in effect from and after the passage of Chapter 474, Laws of 1985.

Id. at 1304 (McRae, J., dissenting) (quoting MISS. CODE ANN. § 11-46-6 (Supp. 1987)).

[156] *Id.* (McRae, J., dissenting).

[157] *Id.* (McRae, J., dissenting).

[158] *Id.* at 1304-05 (McRae, J., dissenting).

[159] *See supra* notes 76-103 and accompanying text.

[160] 580 So. 2d 733 (Miss. 1991).

[161] *Starnes*, 580 So. 2d at 735.

Even assuming his supposition regarding the Act's effective dates to be incorrect, however, Justice McRae asserted that he would still hold that *Presley* should be applied retroactively to July 1, 1984.[162] In a separate dissent,[163] Chief Justice Roy Noble Lee did not address the issue of *Presley*'s prospective effect.[164] Instead, he disagreed with the majority's treatment of the constitutionality of the legislative mandate to apply pre-*Pruett* immunity law.[165] Chief Justice Lee stated that he could not fault the legislative methodology in annually extending sovereign immunity, because, by the time of the decision in *Pruett*, the meaning and application of sovereign immunity were well known to all who might be affected.[166]

Although with less guidance than had been provided in *Pruett*, the Mississippi Supreme Court had once again placed the burden of resolving the complex issues inherent in the sovereign immunity debate squarely upon the Mississippi Legislature. The exigency presented by *Presley*, however, far surpassed that faced by the legislative branch following *Pruett*. While *Pruett* had attempted to allow the Legislature sufficient time to prepare for the demise of common law sovereign immunity, *Presley*'s mandate was immediately effective. Moreover, support for the prospective application of *Presley*'s new rule was, at best, precarious.[167] With only four members of the court favoring prospective application, and considering the threat to the state treasury represented by any reversal of this position, the next legislative session to address this issue would certainly be accompanied by a heightened sense of urgency.

---

[162] *Presley*, 608 So. 2d at 1305 (McRae, J., dissenting).

[163] *Id.* at 1311 (Lee, C.J., dissenting). Justice Prather joined in the dissent. *Id.* (Lee, C.J., dissenting).

[164] *Id.* at 1310 (Lee, C.J., dissenting).

[165] *Id.* at 1310-11 (Lee, C.J., dissenting).

[166] *Id.* at 1311 (Lee, C.J., dissenting).

[167] *See* Van Ovost v. City of Ackerman, 147 F.R.D. 112, 118 n.15 (N.D. Miss. 1993) (noting that "the final chapter on [the] question [of prospective/retroactive application of *Presley*] may not have been written").

V. The Legislative Response to *Presley*

A. 1992 Special Session

The initial legislative reaction to *Presley* was indeed swift. In September 1992, three weeks following *Presley*, the Mississippi Legislature convened in special session to consider its response.[168] First, the Legislature reenacted its "declaration" that the state and its political subdivisions possessed general immunity from tort liability.[169] In contrast to each previous enactment, however, the Legislature did not phrase the declaration in prospective terms.[170] Instead, the statute granted immunity immediately upon its passage.[171] However, the grant of immunity expressly excepted incorporated municipalities engaging in the performance of proprietary functions.[172] In addition, the Legislature repealed in its entirety the statute prescribing the claims and causes of action to which the Sovereign Immunity Act applied, a portion of which the court in *Presley* had declared unconstitutional.[173]

The legislation passed during the 1992 Special Session also authorized any governmental entity to obtain liability insurance covering wrongful or tortious acts or omissions by the entity or its employees.[174] Should insurance be purchased under the authority of this statute, sovereign immunity was waived only to the extent of the applicable policy limits.[175] Governmental entities were also given limited discretionary authority to pay tort claims within the deductible amount of any available insurance.[176] Demonstrating the temporary nature of the legislation passed during this special session, the Legislature scheduled the provisions regarding liability insurance for automatic repeal from and after July 1, 1993, as to the state, and from and after October 1, 1993, as to political subdivisions.[177] Accordingly, a federal district court considered this legislation a "temporary, emergency measure," and anticipated that the Legislature would conduct further study and activity in response to *Presley* in 1993.[178]

---

[168] *See supra* notes 14-15 and accompanying text; *see also* Richard T. Phillips, *Sovereign immunity: An issue of 'responsibility'*, CLARION-LEDGER (Jackson, Miss.), Sept. 16, 1992, at 8A.

[169] Act of Sept. 16, 1992, ch. 3, sec. 1, § 1, Miss. Laws 4 (Extraordinary Session).

[170] *See* Act of May 12, 1992, ch. 491, sec. 3, 1992 Miss. Laws 647,648 (amending § 11-46-3 of Mississippi Code) and each previous enactment of the statute.

[171] 1992 Miss. Laws ch. 3, sec. 1, § 1 (Extraordinary Session).

[172] *Id.* sec. 1, § 2.

[173] *Id.* sec. 2.

[174] *Id.* sec. 3, § 1.

[175] *Id.* sec. 3, § 2.

B. 1993 Amendments to the Sovereign Immunity Act

Confronted with the inescapable fact that the Sovereign Immunity Act was no longer the subject of mere academic dispute, the Mississippi Legislature incorporated many broad and sweeping changes into the statutory scheme during the 1993 Regular Session.[179] The most prominent, and potentially controversial, modification occurred within the Act's "declaration of legislative intent."[180] In contrast to the prospective language of past enactments, the Legislature declared that, as a matter of public policy, the state and its political subdivisions "are not now, have never been and shall not be liable, and are, always have been, and shall continue to be immune" from tort liability.[181] The statute further provided:

> The immunity of the state and its political subdivisions recognized and reenacted herein is and always has been the law in this state, before and after November 10, 1982, and before and after July 1, 1984, and is and has been in full force and effect in this state except only in the case of rights which, prior to the date of final passage hereof, have become vested by final judgment of a court of competent jurisdiction or by the

---

[176] *Id.* sec. 3, § 3.

[177] *Id.* sec. 3, § 4.

[178] Van Ovost v. City of Ackerman, 147 F.R.D. 112, 119 (N.D. Miss. 1993).

[179] *See* Act of Apr. 1, 1993, ch. 476, 1993 Miss. Laws 519 (amending several sections in title 11, chapter 47 of Mississippi Code.).

[180] *See* MISS. CODE ANN. § 11-46-3 (Supp. 1993).

[181] MISS. CODE ANN. § 11-46-3(1) (Supp. 1993).

> express terms of any written contract or other instrument in writing.[182]

Looking backward to both before and after the date of *Pruett* and the effective date of *Pruett*'s mandate, this statute clearly constitutes retroactive legislation.[183] It also reflects legislative recognition of the tenuous nature of *Presley*'s rule of prospective application. Concomitant with each annual legislative extension of common law sovereign immunity had been a "declaration of legislative intent" asserting that the state's *legislative* immunity from suit would commence on and after a date certain the following year.[184] As noted above, however, *Presley* removed the pre-*Pruett* immunity shield from each previous version of the Sovereign Immunity Act. Without the protection afforded by statutory imposition of pre-*Pruett* immunity law, the prospective declarations of legislative immunity appear to create a nine-year gap in which there is no effective legislative enactment of statutory sovereign immunity.

In recognition of this dilemma, the plurality in *Presley* extended judicial application of common law sovereign immunity for claims arising prior to the date of *Presley*.[185] However, should the rule in *Presley* subsequently receive retroactive application, each annual prospective declaration of legislative immunity potentially exposes the state and its local subdivisions to tort liability from and after July 1, 1984, until September 16, 1992 (the effective date of the 1992 Special Session legislation). As such, the 1993 Regular Session's retrospective declaration is obviously intended to cure the potentially disastrous consequences of the prospective immunity terminology relied upon in earlier versions.[186]

---

[182] MISS. CODE ANN. § 11-46-3(2) (Supp. 1993).

[183] *See generally* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 692 (1960) (distinguishing retroactive enactments from prospective legislation).

[184] *Compare* MISS. CODE ANN. § 11-46-3 (Supp. 1993) *with* 1993 Miss. Laws ch. 491, sec. 3 (amending § 11-46-3 of Mississippi Code).

[185] *See supra* notes 149-153 and accompanying text.

[186] For a discussion of potential constitutional considerations concerning retroactive legislation, see *infra* notes 224-249 and accompanying text.

Although the foregoing amendment offers the highest potential for future contention, the 1993 Regular Session produced several other critically important modifications to the Sovereign Immunity Act. The most significant change, however, was the one that, for the first time, was not made. The dates of the immediately preceding extension of the statutory waiver of immunity under the Act remained unchanged.[187] Therefore, from and after July 1, 1993, as to the state, and from and after October 1, 1993, as to political subdivisions, the Sovereign Immunity Act would finally regulate governmental tort liability.[188] As if in preparation for this new era, however, the Legislature also added two new categories to the previous list of nineteen specific exemptions from the Act's waiver of immunity.[189] Furthermore, after nine consecutive enactments of a two-year statute of limitations, the Legislature reduced the Act's limitations period to one year following accrual of any cause of action.[190]

The 1993 amendments also created the Mississippi Tort Claims Board.[191] The new board is given the responsibility for administering the Act previously delegated to the State Fiscal

---

[187] *Compare* MISS. CODE ANN. § 11-46-5(1) (Supp. 1993) *with* 1992 Miss. Laws ch. 491, sec. 4, § 1 (amending § 11-46-5 of Mississippi Code).

[188] MISS. CODE ANN. § 11-46-5(1) (Supp. 1993).

[189] *See* MISS. CODE ANN. § 11-46-9(c), (m) (Supp. 1993). The new exemption from liability regarding claims of state prisoners arising out of the performance of required or authorized work details appears to be intended to specifically address the factual situation presented by Starnes v. City of Vardaman, 580 So. 2d 733 (Miss. 1991). *See supra* notes 117-122 and accompanying text. During the 1994 legislative session, the Legislature amended § 11-49-9 in an effort to clarify this exclusion, dividing the former subsection (m) into two separate subsections. *See* 1994 Miss. Laws ch. 334. This slight alteration represents the only change to the Sovereign Immunity Act made during the 1994 legislative session.

[190] *See* MISS. CODE ANN. § 11-46-11(3) (Supp. 1993). The statute further provides:

> The limitations period provided herein shall control and shall be exclusive in all actions subject to and brought under the provisions of this chapter, notwithstanding the nature of the claim, the label or other characterization the claimant may use to describe it, or the provisions of any other statute of limitations which would otherwise govern the type of claim or legal theory if it were not subject to or brought under the provisions of this chapter.

Id.

[191] MISS. CODE ANN. § 11-46-18 (Supp. 1993).

Management Board.[192] The Tort Claims Board consists of seven members, one of whom is appointed by the governor, subject to the advice and consent of the state senate, to chair the committee.[193] Other board members include the Attorney General, the State Treasurer, the Commissioner of Public Safety, the Commissioner of Insurance, and the Director of the Department of Environmental Quality.[194] The Director of the Department of Finance and Administration holds the final position and serves as the executive director, with authorization to conduct the board's administrative affairs.[195] The powers and duties of the board are similar to those formerly delegated to the State Fiscal Management Board, but include authority to assign claims under the Act to outside counsel, to approve claims for attorney fees, and to employ a full-time staff attorney and such other staff as is necessary to carry out the purposes of the Sovereign Immunity Act.[196]

Finally, the new amendments included a stipulation declaring the Act's provisions to be independent and severable.[197] Any determination regarding the invalidity of one provision under the Act, therefore, will have no effect on the validity or enforceability of any other provision.[198] This statute obviously anticipates that the supreme court may again be called upon to review the Sovereign Immunity Act, including, most probably, potential challenges to the retroactive effect of the 1993 legislative declaration of immunity.

VI. WHAT IS THE FUTURE FOR GOVERNMENTAL IMMUNITY IN MISSISSIPPI?

As demonstrated by the foregoing discussion, there are many unanswered questions concerning governmental immunity in Mississippi. Although the Mississippi Supreme Court has, since *Pruett*, attempted to shift responsibility for this public policy issue to the Legislature, it is indeed unlikely that *Presley* will be the court's final landmark decision in this area. This section will offer a brief, and non-exclusive, discussion of issues which, in all probability, the court will be called upon to address in the near future.

---

[192] *Compare* MISS. CODE ANN. § 11-46-19(1) (Supp. 1993) *with* 1988 Miss. Laws ch. 479, sec. 5, § 1.

[193] MISS. CODE ANN. § 11-46-18(1)(a) (Supp. 1993).

[194] MISS. CODE ANN. § 11-46-18(1)(b)-(c), (e)-(g) (Supp. 1993).

[195] MISS. CODE ANN. § 11-46-18(1)(d) (Supp. 1993).

[196] *See* MISS. CODE ANN. § 11-46-19(d)-(f) (Supp. 1993).

[197] *See* MISS. CODE ANN. § 11-46-23 (Supp. 1993).

[198] *Id.*

A. *Prospective Application of Presley*

The question most in need of a clear and unequivocal answer from the Mississippi Supreme Court is whether the rule announced in *Presley* will receive prospective or retroactive application. Although post-*Presley* cases have already reflected the sharp disagreement within the court on this issue, the court has yet to provide a definitive answer.

In *Churchill v. Pearl River Basin Development District*,[199] the plaintiff sued a governmental entity for injuries sustained in an August 1, 1981, accident at a county-maintained recreational facility.[200] Because the incident occurred prior to the court's decision in *Pruett*, the claim was governed by pre-*Pruett* immunity law.[201] Justice McRae, writing for the *Churchill* court, acknowledged as much, noting that "because the injury occurred prior to our decision in *Pruett*, we apply sovereign immunity case law prior to *Pruett*."[202] Although it was unnecessary to the decision, Justice McRae nevertheless determined that the status of the court's decision in *Presley* would be addressed prior to reaching the merits of Churchill's claim.[203]

In his summary of *Presley*, Justice McRae noted that, although a majority of justices had agreed that the statutory command to apply pre-*Pruett* common law was unconstitutional, only four votes had been cast in favor of *Presley*'s prospective application.[204] Because the latter issue had not also commanded a majority, therefore, Justice McRae urged that the holding of the *Presley* court must necessarily be "'viewed as that position taken by those members who concurred in the judgmen[t] on the narrowest grounds.'"[205] In *Presley*, the narrowest grounds commanding a majority had invalidated, on constitutional grounds, the legislative mandate to apply pre-*Pruett* immunity law. Because a majority vote was not cast in favor of *Presley*'s prospective application, Justice McRae concluded that the plurality opinion on this issue had no precedential value.[206] In a concurring opinion, Justice Banks correctly noted that, because the accident in question had occurred prior to *Pruett*, the *Churchill* court's discussion of *Presley* and the prospective/retroactive issue was "unnecessary" and "irrelevant."[207]

---

[199] 619 So. 2d 900 (Miss. 1993).

[200] *Churchill*, 619 So. 2d at 901.

[201] *See supra* note 104 and accompanying text.

[202] *Churchill*, 619 So. 2d at 904.

[203] *Id.*

[204] *Id.*

The court renewed this debate in *Rector v. Mississippi State Highway Commission*.[208] In *Rector*, Justice Banks, writing for the court, reaffirmed *Presley*'s pronouncement that the court would continue to immunize the state against tort claims arising prior to *Presley* by applying "evolving standards of common law."[209] In this instance, however, it was Justice McRae's turn to protest. Reemphasizing the argument "that because the decision in *Presley* voiced the opinion of a plurality, not a majority, of the court, it had no precedential value," Justice McRae contended that the *Rector* court had improperly cited this portion of the *Presley* decision as binding precedent.[210]

Nearly a month following *Rector*, the case of *Morgan v. City of Ruleville*[211] offered the court what appeared to be a perfect opportunity to clarify its position on this issue. *Morgan* involved a drowning in a municipal swimming pool which occurred in May 1987—post-*Pruett*, but pre-*Presley*.[212] Justice Prather, writing for the *Morgan* court, acknowledged that events subsequent to *Presley* had raised "a question as to whether [the] decision should be applied retroactively or prospectively."[213] Notwithstanding the court's recognition of this important issue, the majority opinion failed to provide a direct answer.

---

[205] *Id.* (quoting City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 764 (1988)).

[206] *Id.*

[207] *Churchill*, 619 So. 2d at 907 (Banks, J., concurring).

[208] 623 So. 2d 975 (Miss. 1993).

[209] *Rector*, 623 So. 2d at 977.

[210] *Id.* at 979 (McRae, J., dissenting).

[211] 627 So. 2d 275 (Miss. 1993).

Justice Prather, who, along with Justice Roy Noble Lee, took no position during *Presley*'s prospective/retroactive debate,[214] noted that Justice McRae's *Churchill* opinion had not addressed whether their failure to join the fray should be construed as a vote for or against prospective application of *Presley*, or simply a non-vote on the issue.[215] Assuming for purposes of her opinion that a plurality vote favoring prospective application had indeed been cast, Justice Prather ratified Justice McRae's earlier conclusion that this aspect of *Presley* had no precedential value.[216] Although, at this point, the moment was ripe for the court to state, in a clear and resounding voice, its position on the prospective/retroactive issue, the court chose not to do so. Instead, without further discussion or analysis, the *Morgan* court simply held that the trial judge should have applied the law of sovereign immunity "as it stood before *Pruett*."[217]

---

[212] *See Morgan*, 627 So. 2d at 277.

[213] *Id.* at 278.

[214] *See supra* notes 163-64 and accompanying text.

[215] *Morgan*, 627 So. 2d at 278. Should this issue need to be addressed in the future, however, Justice Prather offered no insight regarding within which category her vote in *Presley* should be placed.

[216] *Id.*

[217] *Id.* at 278-79. The simple command to the lower court to apply the law "as it stood before *Pruett*," however, appears no different than the statutory mandate to apply pre-*Pruett* case law that the supreme court objected so strenuously to in *Presley*. The *Presley* court ruled that the legislative directive to so "freeze" the common law unconstitutionally restricted the judicial power to create and apply common law as circumstances warranted. *See supra* notes 142-44 and accompanying text. The supreme court's instruction to the trial judge in *Morgan*, however, appears to be equally restrictive. It was for this reason that Justice Banks maintained in *Presley* that any future judicial application of sovereign immunity should utilize evolving standards of common law on a case-by-case basis. Presley v. Mississippi State Highway Comm'n,

The two foremost principals in this debate, Justices McRae and Banks, both filed separate opinions in *Morgan*. Although not engaging in a discussion of the prospective/retroactive question, Justice McRae cited disagreement "with the majority's indulgence in pre-*Pruett* analysis to reach its decision."[218] In a brief concurrence, Justice Banks stated that his agreement with the result reached by the majority was not based on pre-*Pruett* law.[219] Instead, Justice Banks resolved that "[t]he common law of sovereign immunity, whether established before *Pruett* or evolving after *Pruett*, dictates the result reached today."[220]

To the extent that claimants potentially barred by sovereign immunity, governmental entities and employees facing possible tort liability, or trial courts with pending cases are waiting for explicit guidance on the issue of *Presley*'s prospective application, *Morgan* certainly had to be a disappointment. Instead of finally resolving the question, *Morgan* allowed the debate to enjoy continued life. Nevertheless, *Morgan*'s application of pre-*Pruett* law to a pre-*Presley* claim certainly reflected the supreme court's reluctance to require retroactive application of *Presley*. Indeed, it is highly probable that most trial courts would interpret *Morgan* as mandating application of pre-*Pruett* immunity law to pre-*Presley* claims.

Following *Morgan*, however, this issue has been further confused by the supreme court's recent *en banc* decision in *Coplin v. Francis*.[221] In *Coplin*, the plaintiffs sued a county supervisor and "District Five of Monroe County, Mississippi," regarding a September 1985 accident allegedly caused by the negligent maintenance of a county bridge—a post-*Pruett*, but pre-*Presley* occurrence.[222] The decision in *Coplin*, authored by Justice Hawkins, primarily involves whether the common law defense of qualified immunity was available to the county

---

608 So. 2d 1288, 1301 (Miss. 1992).

[218] *Morgan*, 627 So. 2d at 282 (McRae, J., dissenting).

[219] *Id.* at 283 (Banks, J., concurring).

[220] *Id.* (Banks, J., concurring).

[221] 631 So. 2d 752 (Miss. 1994) (en banc).

[222] *Coplin*, 631 So. 2d at 753.

supervisor.[223] However, in a perfunctory paragraph at the end of the opinion, a bare majority of the court also held that the governmental entity in question[224] "enjoyed sovereign immunity," because the accident occurred after enactment of the 1985 version of the Sovereign Immunity Act.[225] Without explanation, and with absolutely no reference to the court's recent debate in *Churchill*, *Rector* and *Morgan*, the *Coplin* court simply provided a citation to *Presley* in support of this holding.[226]

Notwithstanding its failure to articulate any supporting rationale for the decision, the *Coplin* court's enforcement of a pre-*Presley* version of the Sovereign Immunity Act, including, of course, its mandate to apply pre-*Pruett* common law immunity, clearly represents a prospective application of *Presley*. Justice McRae certainly understood this to be the practical effect of the majority opinion,[227] as reflected by his sharply-worded dissent once again arguing that *Presley* should receive completely retroactive application.[228] Asserting that the court had erroneously relied on *Presley* to vest the local governmental entity with sovereign immunity, Justice McRae decried the "selective prospectivity spawned by this Court's decision in *Presley*."[229]

---

[223] *Id.* at 753-55. The court unanimously agreed that the county supervisor could not rely on qualified immunity, because the construction and maintenance of the bridge was a ministerial, as opposed to a discretionary, function. *Id.*

[224] *Id.* at 755. The governmental entity addressed in the majority opinion was Monroe County. *Id.* As noted above, however, the plaintiffs did not sue Monroe County, but, rather, "Supervisor's District Five of Monroe County." *Id.* at 753. Because the supervisor's district was not an entity capable of being sued, Justice Banks dissented from this portion of the majority opinion, noting that neither Monroe County nor the issue of its liability *vel non* were properly before the court. *Id.* at 756 (Banks, J., dissenting).

[225] *Id.* at 755 (citing 1985 Miss. Laws, ch. 474, § 12). Justices Prather, Pittman, Roberts and Smith joined in this aspect of Justice Hawkins' opinion. *Id.*

[226] *Id.*

[227] It would appear that Justice Hawkins changed his position on the prospective/retroactive debate in *Coplin*. Previously, he had voted with Justice McRae on this issue in *Presley*. *See supra* note 154 and accompanying text.

[228] *Coplin*, 631 So. 2d at 756-57 (McRae, J., dissenting). Justices Dan Lee and Sullivan joined in Justice McRae's dissent. *Id.* (McRae, J., dissenting).

[229] *Id.* at 756 (McRae, J., dissenting).

In the light of *Morgan* and *Coplin*, it seems apparent that, for the moment, a majority of the supreme court intend to apply *Presley* prospectively. In order to provide an unequivocal resolution to this intensely disputed issue, however, it is not enough for the court to simply state, as it did in *Morgan*, that *Presley*'s plurality opinion regarding its prospective application has no precedential value. In this respect, *Morgan* certainly does not constitute a reversal of the *Presley* plurality on this point. At best, *Morgan* simply placed the entire question into judicial limbo.

Nor is *Coplin* a satisfactory response. The *Coplin* court's unexplained citation to *Presley* in support of a prospective application of the *Presley* rule clearly contradicts its announcement in *Morgan* that *Presley* could not be considered binding precedent on this issue. This obfuscatory action provides, at best, inadequate guidance to trial courts, claimants, and potentially liable parties; at worst, it is an unconscionable avoidance of the supreme court's obligation to provide a clear and precise rule for those entities to follow. If the court intended to take a firm stand on this issue in *Coplin*, it should, in no uncertain terms, have said so.

As Justice Banks aptly noted in *Presley*, this question is of critical importance.[230] Between July 1, 1984, and August 31, 1992, the state and its political subdivisions were certainly justified in relying on the legislative statement of immunity contained in the Sovereign Immunity Act, no matter how unartfully drafted, especially in light of the supreme court's enforcement of that statutory immunity in several cases prior to *Presley*.[231] Given these circumstances, the *Presley* plurality made a rational decision to eliminate an unanticipated risk to the public treasury represented by the announcement of an unforeseeable new rule. The policy considerations underlying that decision have not diminished in the brief period since *Presley*. The supreme court should take decisive steps to eliminate the confusion on this issue at the earliest available opportunity.

---

[230] *See Presley*, 608 So. 2d at 1298.

[231] *See supra* notes 106-25 and accompanying text.

B. *Retroactive Legislation*

In the event that common law immunity protection for pre-*Presley* claims is ultimately eliminated through retroactive application of *Presley*, the retroactive declaration of legislative immunity enacted in 1993 achieves increased importance.[232] Even if the supreme court does not reverse course on this question, however, claims arising between the effective dates of *Presley* and the 1992 Special Session laws are also ostensibly subject to this retrospective grant of legislative sovereign immunity. It is reasonable to expect, therefore, that courts will soon begin to address broad constitutional challenges to this legislation.

The United States Constitution does not directly prohibit states from enacting retroactive civil statutes.[233] Although a closely related concept, the constitutional prohibition against ex post facto legislation[234] is limited to retroactive criminal laws.[235] As such, the constitutional validity of state retroactive civil legislation is primarily determined under the contracts clause[236] or the fourteenth amendment's due process clause.[237] Because Mississippi's retroactive sovereign immunity statute relates to tort liability, however, the contracts clause argument is inapplicable.

---

[232] *See supra* notes 180-82 and accompanying text.

[233] Robert C. DeGaudenzi, Note, *Death is Still Certain, But are Taxes?: An Examination of the Due Process Limitations on Retroactive Tax Legislation After* Carlton v. United States, 67 ST. JOHN'S L. REV. 327, 327 n.1 (1993).

[234] U.S. CONST. art. I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed."); U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law. . . ."); *cf.* MISS. CONST. art. 3, § 16 ("Ex post facto laws, or laws impairing the obligation of contracts, shall not be passed.").

[235] *See* Harisiades v. Shaughnessy, 342 U.S. 580, 594-95 (1952); Calder v. Bull, 3 U.S. (3 Dall.) 386, 390, 397 (1798); *see also* DeGaudenzi, *supra* note 233, at 327 n.1; Hochman, *supra* note 183, at 694; *cf.* Dunn v. Grisham, 157 So. 2d 766, 768 (Miss. 1963) (holding that Mississippi's ex post facto provision "relates exclusively to criminal or penal statutes").

[236] U.S. CONST. art I, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . .").

[237] U.S. CONST. amend. XIV, § 1; *see* Hochman, *supra* note 183, at 694. Another constitutional amendment under which retroactive civil legislation has been challenged

Despite a healthy suspicion of retroactive civil statutes, legislative enactment of laws with a retrospective effect are regularly upheld by courts.[238] Prejudice against retroactive legislation stems in large part "from the principle that a person should be able to plan his conduct with reasonable certainty of the legal consequences."[239] Therefore, in evaluating a due process challenge to such a law, a court is called upon to balance equally important policy considerations in an effort to reach a just result. As one commentator has noted:

> In determining the constitutionality of federal statutes under the indefinite language of the due-process clause, the [United States] Supreme Court has recognized that although there are serious objections to retroactivity, in any particular case mitigating considerations may exist which would make a retroactive statute a desirable piece of legislation. Thus the Court has consistently held that not all retrospective statutes are unconstitutional, but only those which, upon a balancing of the considerations on both sides, are felt to be unreasonable.[240]

In this regard, the United States Supreme Court has utilized due process to curb four major areas of retroactive civil legislation: (1) emergency legislation; (2) curative statutes; (3) taxing statutes; and (4) general legislation.[241]

Mississippi's retroactive sovereign immunity statute appears to fall squarely within the parameters of "curative legislation," defined as those "statutes that retroactively adjust

---

is the Fifth Amendment's prohibition against taking private property for public use. *See* U.S. CONST. amend. V. It is unlikely, however, that a challenge to Mississippi's retroactive sovereign immunity statute on this basis would survive. It is "generally accepted . . . that the prohibition against the taking of private property for public use applies only to direct appropriations of private property by the government." Hochman, *supra* note 183, at 694 n.15.

[238] DeGaudenzi, *supra* note 233, at 327 n.1.

[239] Hochman, *supra* note 183, at 692.

[240] *Id.* at 694-95.

[241] DeGaudenzi, *supra* note 233, at 328 n.2 (citing RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.9, at 457 (2d ed. 1992)).

existing legislation to conform to the putative intent of the legislature."[242] Courts tend to uphold curative acts more often than other forms of retroactive legislation, primarily because a Legislature may permissibly "clarify[] what it meant all along."[243] Indeed, in attempting to protect an individual's reliance on existing law, a convincing case is made for upholding the validity of curative legislation, because "it does not merely deny that which was not expected, but restores a situation that was affirmatively anticipated and provided for."[244]

Viewed in this light, it is clear that the Mississippi Legislature's enactment of retrospective sovereign immunity is of a curative nature. As the Mississippi Supreme Court has often recognized, the Legislature plainly intended to grant general legislative immunity to the state and its political subdivisions through the annual statutory mandates to apply pre-*Pruett* immunity law.[245] As such, the Legislature's recent statutory declaration that legislative immunity has existed since, and before, the effective date of *Pruett*'s mandate attempts to cure inadvertent defects in previous legislative actions which prevent them from having their intended effect.[246] Such curative actions which effectively implement original legislative intent have been upheld as constitutional, even where a claimant is deprived of a right resulting from an unexpected judicial interpretation of a statute.[247] Moreover, an individual claiming the existence of a "vested right" arising from such a defect is seeking a windfall because, had the original legislation had its intended effect, no such cause of action could have arisen.[248]

---

[242] Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 468 (1982).

[243] *Id.* at 468-69; *see also* W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CAL. L. REV. 216, 238 (1960) ("The [United States Supreme] Court has almost always upheld 'curative' legislation designed to restore what was believed to have been the status quo.").

[244] Slawson, *supra* note 243, at 239.

[245] *See, e.g.*, Webb v. Jackson, 583 So. 2d 946, 951-52 (Miss. 1991); Richardson v. Rankin County Sch. Dist., 540 So. 2d 5, 7-8 (Miss. 1989); Webb v. County of Lincoln, 536 So. 2d 1356, 1358 (Miss. 1988).

[246] MISS. CODE ANN. § 11-46-3 (Supp. 1993).

[247] *See* Hochman, *supra* note 183, at 705, 720-21.

Decisions of the Mississippi Supreme Court also recognize the ability of the Legislature to give statutes retroactive effect. For example, in *State ex rel. Moore v. Molpus*,[249] the court acknowledged the authority of the Legislature to give statutes retroactive effect, provided such an intention is "manifested by the clearest and most positive expression."[250] Moreover, in *Stamper v. Edwards*,[251] the court ruled that "familiar prohibitions on *ex post facto* laws do not preclude the Legislature (or this Court) giving retroactive effect to new enabling, power conferring rules, or rules of procedure or practice, or new rules of duty and obligation foreshadowed by what had gone before."[252] In this regard, the *Stamper* court further emphasized that "we have on occasion looked to post-event legislation to clarify the pre-enactment content of the law."[253] *Stamper* identifies two issues for consideration in such an analysis: (1) whether any vested right is offended; and (2) whether a claimant's reasonable reliance is disappointed.[254]

As noted above, any argument that a "vested right" arose following *Presley* is facetious because it cuts against the obvious and well-understood legislative intent of each enactment of the Sovereign Immunity Act.[255] Nor can reasonable reliance be said to have been disappointed because, given the consistent judicial enforcement of these statutes prior to *Presley*,[256] there was no justifiable reason for potential claimants to believe that a right of action in tort existed against the state which would be free from the legislative grant of sovereign immunity. Indeed, absolutely no reliance can arguably be claimed for causes of action arising prior to *Presley*, as the supreme court, in *Morgan* and in *Coplin*, recently indicated its continued willingness to apply common law immunity to such claims.[257] Because Mississippi's retroactive sovereign immunity statute does nothing more than confirm previously held expectations, therefore, any individual interest in receiving an unanticipated windfall is outweighed by the strong government interest in the retrospective curing of inadvertent defects in the original legislative scheme.[258]

---

[248] *Id.* at 705.

[249] 578 So. 2d 624 (Miss. 1991) (en banc).

[250] *Moore*, 579 So. 2d at 643 (quoting Mladinich v. Kohn, 186 So. 2d 481, 484 (Miss. 1986)).

[251] 607 So. 2d 1141 (Miss. 1992).

[252] *Stamper*, 607 So. 2d at 1148 (footnote and citations omitted).

[253] *Id.* at 1149.

[254] *Id.*

[255] Hochman, *supra* note 183, at 705.

[256] *See supra* notes 106-25 and accompanying text.

C. The Legislative Policy of Sovereign Immunity

Another potential challenge which the Mississippi Supreme Court may eventually address is that legislative reenactment of sovereign immunity, no matter its form, violates the "remedy clause" of the Mississippi Constitution. The "remedy clause" provides that "[all] courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay."[259] Indeed, Justice McRae has previously advanced this argument as a means to absolute abrogation of sovereign immunity.[260] However, although not binding on the Mississippi Supreme Court, the United States Fifth Circuit Court of Appeals rejected this exact argument in *Grimes v. Pearl River Valley Water Supply District*.[261] Judge Reynaldo Garza, writing for the

---

[257] *Morgan*, 627 So. 2d at 278-79.

[258] Hochman, *supra* note 183, at 705-06.

[259] MISS. CONST. art. 3, § 24.

[260] *See* Presley v. Mississippi State Highway Comm'n, 608 So. 2d 1288, 1302 (Miss. 1992) (en banc) (McRae, J., dissenting) (contending that remedy clause "effectively eviscerated the doctrine" of sovereign immunity); Webb v. Jackson, 583 So. 2d 946, 954 (Miss. 1991) (McRae, J., dissenting); *see also* Jones v. Knight, 373 So. 2d 254, 259 (Miss. 1979) (en banc) (Bowling, J., dissenting). Although both Justice Bowling and Justice McRae have stated that the remedy clause was first enacted in the Mississippi Constitution of 1890, after judicial creation of sovereign immunity in the United States and Mississippi, this clause has actually been a part of every Mississippi Constitution since 1817, and has its origin in chapter 29 of the Magna Carta. Luther T. Munford & E. Marcus Wiggs, III, *Commentary on the Bill of Rights in the Mississippi Constitution of 1890 and Beyond*, 56 MISS. L.J. 73, 102 (1986).

[261] 930 F.2d 441 (5th Cir. 1991).

Grimes court, concluded that the legislative enactment of sovereign immunity did not violate the remedy clause, inasmuch as "[t]he Mississippi Constitution places no limitation on the Mississippi Legislature's ability to enact legislation."[262]

Decisions of the Mississippi Supreme Court, as well, indicate that the remedy clause, standing alone, is an insufficient basis upon which to set aside the post-*Pruett* legislative policy of sovereign immunity. For example, in *Walters v. Blackledge*,[263] the court rejected the argument that the state Worker's Compensation Act violated the remedy clause.[264] The *Walters* court held that "except as to vested rights a state legislature has full power to change or to abolish existing common law remedies or methods of procedure."[265] *Walters* was subsequently followed by the supreme court in *Anderson v. Fred Wagner & Roy Anderson, Jr., Inc.*,[266] in which the court held that the remedy clause did not invalidate the ten-year statute of repose for suits against contractors and architects.[267]

Moreover, the supreme court has observed on numerous occasions, including in *Pruett* and in *Presley*, that sovereign immunity is a question of public policy to be supervised and controlled by the state Legislature.[268] Indeed, in *Pruett*, Justice Bowling discussed the remedy clause immediately after noting that "the control and policing of sovereign immunity is a legislative responsibility and not that of the judiciary," giving no indication that the latter concept could even remotely be considered constitutionally suspect.[269] In similar circumstances, other states, including Wyoming, New Hampshire, Kansas, and Arkansas, have rejected similar state "remedy clause" challenges to legislative reenactment of sovereign immunity following judicial abolition of the court-created doctrine.[270] Such sweeping challenges to Mississippi's legislative policy of sovereign immunity in sole reliance on the remedy clause of the Mississippi Constitution should be accorded a similar fate.

---

[262] *Grimes*, 930 F.2d at 443; *see also* Munford & Wiggs, *supra* note 260, at 103 (noting that analysis of similar constitutional provisions in other states reveals that such "remedy provisions" merely guarantee due process, and place no restriction on legislative innovation); David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35, 67 (1986). The *Grimes* court also rejected federal equal protection and due process challenges to the legislative policy of sovereign immunity. *Grimes*, 930 F.2d at 444.

[263] 71 So. 2d 433 (Miss. 1954).

[264] *See Walters*, 71 So. 2d at 445.

[265] *Id.* at 446.

[266] 402 So. 2d 320 (Miss. 1981).

[267] *See Anderson*, 402 So. 2d at 321, 324.

[268] *See, e.g.*, Presley v. Mississippi State Highway Comm'n, 608 So. 2d 1288, 1291 (Miss. 1992) (en banc); Webb v. Jackson, 583 So. 2d 946, 951-52 (Miss. 1991); Richardson v. Rankin County Sch. Dist., 540 So. 2d 5, 7-8 (Miss. 1989); Webb v. County of Lincoln, 536 So. 2d 1356, 1358 (Miss. 1988); Pruett v. City of Rosedale, 421 So. 2d 1046, 1047 (Miss. 1982) (en banc). *Accord* Mississippi Baptist Hosp. v. Holmes, 55 So. 2d 142, 152 (Miss. 1951) ("[T]he functions of creating a public policy is primarily one to be exercised by the Legislature. . . .").

VII. CONCLUSION

The journey begun in 1982 still continues. Notwithstanding *Pruett*'s abrogation of Mississippi's century-old judicial doctrine of sovereign immunity, the journey did not end, as intended, on July 1, 1984. Instead, pre-*Pruett* common law immunity received another eight years of life through legislative decree. Although, in 1992, the Mississippi Supreme Court ended legislative efforts to preserve *Pruett's* mandate in perpetual stasis, *Presley* still did not write the final chapter in the chronicles of Mississippi common law sovereign immunity. Instead, there remain numerous pre-*Presley* claims against state governmental entities which, for the moment, are subject to the common law doctrine of sovereign immunity.

---

[269] *Pruett*, 421 So. 2d at 1047-48.

[270] *See* Hardin v. City of Devalls Bluff, 508 S.W.2d 559, 561-63 (Ark. 1974) (stating that "legislature was free to legislate in this field and to declare the State's public policy"); Brown v. Wichita State Univ., 547 P.2d 1015, 1023-24 (Kan. 1976) (holding remedy clause may "not be invoked to invalidate *every* statutory or judicial limitation on remedies"); Estate of Cargill v. City of Rochester, 406 A.2d 704, 706 (N.H. 1979) (stating remedy clause "does not prohibit all impairments of the right of access to the courts"); Troyer v. State, 722 P.2d 158, 162-63 (Wyo. 1986); (rejecting dissenting justice's view that remedy clause restricted Legislature's power to modify state's amenability to suit). For an additional discussion of legislative competence to alter common law rules governing tort liability of public entities, see Arvo Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 163, 225-29 (1963).

Presley does represent, however, a clear line of demarcation. Tort claims accruing after the effective date of *Presley*'s mandate are no longer subject to a legislative (or judicial) imposition of common law sovereign immunity, but, instead, to the Mississippi Sovereign Immunity Act. Finally, the comprehensive statutory scheme which took ten legislative sessions to complete can begin the job for which it was designed. Although questions regarding the status of pre-*Presley* claims remain for the state judiciary to answer, responsibility for the control and supervision of the public policy of sovereign immunity in Mississippi will soon be completely vested in the legislative branch.

THE PURSUIT OF DEEP POCKETS: AN HISTORICAL OVERVIEW OF PUNITIVE DAMAGES IN MISSISSIPPI

John G. Corlew[*]

I. INTRODUCTION

Mississippi first approved punitive damages in 1854. In *Bell v. Morrison*,[1] the Mississippi High Court of Errors and Appeals affirmed a $1200 verdict for actual and punitive damages and stated:

> It is settled by authorities almost without exception, in England and in the United States, that in actions for injuries to the person or to the character, the jury are not restricted, in giving damages, to the actual, positive injury sustained by the plaintiff, but may give damages as a punishment against the defendant; that not only may the plaintiff receive compensation for the injury inflicted upon him, but that the interest of society may be regarded, and such damages may be awarded as will tend to operate by way of example, and to deter others from similar acts of violence and oppression.[2]

The underlying cause of action in *Bell* was for assault and battery accompanied by "violence great and cruel."[3] The court admitted proof of the defendant's wealth, stating that all the circumstances "whether of aggravation or mitigation" were to be considered.[4]

---

[*] John G. Corlew is a partner in the firm of Watkins & Eager in Jackson, Mississippi. J.D., Vanderbilt University, 1968; B.A., University of Mississippi, 1965.

[1] 27 Miss. 68 (1854).

[2] Bell, 27 Miss. at 85.

[3] *Id.* at 83.

[4] *Id.* at 86.

From that beginning, the Mississippi courts have allowed punitive damages in almost every type of action imaginable. Given that the primary purpose of punitive damage awards is punishment for malicious wrongdoing, it is to be expected that a large body of Mississippi punitive damage jurisprudence comes from cases of intentional tort. However, punitive damages are also rooted in legions of contract, negligence and other non-intentional tort cases. Many of these cases are in part explained as attempts at judicial implementation of social policy. But there has almost always been — in the non-intentional cases — an overabundance of defendants with obvious wealth. Plaintiffs have acted on the court's 1890 observation that "[t]he more affluent [the defendant], the more able he is to remunerate the party . . . injured."[5] The pursuit of deep pockets may be the most consistent recurring theme in Mississippi punitive damage jurisprudence.

II. A SUCCESSION OF TARGET DEFENDANTS

A. *The Railroad Industry*

In the late 1800's and early 1900's, the deepest pockets in Mississippi were those of the burgeoning railroad developers. The period saw rapid development of railroad lines in the state, as entrepreneurs sought to connect various communities and areas of the state with markets in other areas of the country. From 1885 to 1905, the state railroad mileage almost doubled.[6] Not only did the railroads offer an attractive target because of their wealth, there was an underlying negative sentiment and distrust of railroad companies. Some of the provisions of the Mississippi Constitution of 1890 make this obvious. Thus, section 186 directs the Legislature to pass laws preventing abuse, unjust discrimination and extortion by railroad companies.[7] Section 185 declares that the rolling-stock of a railroad company shall be considered personal property and "liable to execution and sale as such."[8] Commenting on the latter provision, Mississippi Supreme Court Justice George H. Ethridge noted that "[t]he effect is that the railroad companies are more prompt in the settlement of judgments made final than they would otherwise be."[9] The fact that the state's constitution included a specific provision to facilitate collection of judgments against railroads emphasizes their vulnerability to suits and claims of punitive damage. The great number of cases against railroad companies in this era demonstrates that few opportunities to exploit this vulnerability were missed.

---

[5] Eltringham v. Earhart, 7 So. 346, 346 (Miss. 1890) (quoting McNamara v. King, 7 Ill. (2 Gilm.) 432, 437 (1845)).

[6] 2 DUNBAR ROWLAND, MISSISSIPPI 509 (1976).

[7] MISS. CONST. art. VII, § 186.

In 1859 in the case of *New Orleans, Jackson & Great Northern Railroad v. Hurst,*[10] the Mississippi High Court of Errors and Appeals affirmed a $4500 judgment.[11] The plaintiff had taken passage from New Orleans to Quin's Depot in Pike County.[12] The train overshot the depot by three-fourths of a mile and refused to back up, requiring the plaintiff to walk back to the depot. Although the plaintiff's actual damages were at best nominal, the court affirmed the $4500 verdict, stating:

> The law has not intrusted the court with a discretion to estimate damages, but has devolved the power on a jury, as a matter of sentiment and feeling, to be exercised by them according to their sound discretion, duly weighing all the circumstances of the case. . .
>
> . . . .
>
> We can but regret that, under the circumstances of this case, the great principles of law and punitive justice had not been administered in less rigor by the jury, to whom their vindication is wisely committed by our system. . . .[13]

Numerous similar cases of what might be called "negligent transportation" made their way to the state's highest court of appeals.[14] At least one case involved the failure to pick the passenger up at all. In *Yazoo & Mississippi Valley Railroad v. Mitchell*,[15] a $1000 verdict for the plaintiff was affirmed. The plaintiff had to walk ten miles from the Glass station south of Vicksburg to Vicksburg when the train failed to stop at Glass as expected.[16]

---

[8] *Id.* § 185.

[9] GEORGE H. ETHRIDGE, MISSISSIPPI CONSTITUTIONS 347 (1928).

[10] 36 Miss. 660 (1859).

[11] *Hurst,* 36 Miss. at 669.

[12] *Id.* at 665.

[13] *Id.* at 666, 669.

However, whatever success plaintiffs may have experienced in the lower courts, the High Court of Errors and Appeals did adopt a more stringent definition of conduct which would warrant imposition of punitive damage than the free-wheeling jury discretion which it approved in *Hurst*. In *Southern Railroad v. Kendrick*,[17] the court reversed a $5000 award, including punitive damages, noting that a "neglect of duty, clearly not attended with any circumstances of insult, of aggravation of feelings, of injury to the person or his property, or of bodily or mental suffering, would not justify vindictive damages."[18] The court also required the plaintiff to establish some special injury or actual damage in order to recover punitive damage.[19]

The most carefully reasoned opinion of the High Court of Errors and Appeals on this subject, *New Orleans, Jackson & Great Northern Railroad v. Statham*,[20] reversed a verdict of

---

[14] This trend is illustrated by a series of cases from 1866 to 1930. *See* Yazoo & M.V.R. v. Hardie, 55 So. 967, 967 (Miss. 1911) (carrying plaintiff over two hours past her destination); Vicksburg & M. R.R. v. Scanlan, 63 Miss. 413, 414 (1886) (carrying plaintiff five miles beyond his destination); Chicago, St. L. & N.O. R.R. v. Scurr, 59 Miss. 456, 460 (1882) (failing to stop at plaintiff's destination); Memphis & C. R.R. v. Green, 52 Miss. 779, 782 (1876) (departing train failed to give plaintiff sufficient time to board); New Orleans, J. & G.N. R.R. v. Statham, 42 Miss. 607, 613 (1869) (carrying plaintiff six to eight feet beyond platform); Southern R.R. v. Kendrick, 40 Miss. 374, 380 (1866) (carrying plaintiff two miles beyond his destination). As late as 1930, the supreme court affirmed an award of $1.50 in actual and $200 in punitive damages when a railroad company carried the plaintiffs 14 miles beyond their destination. Illinois Cent. R.R. v. Ramsay, 127 So. 725, 725 (Miss. 1930).

[15] 35 So. 339 (Miss. 1903).

[16] *Mitchell*, 35 So. at 340.

[17] 40 Miss. 374 (1866).

[18] *Kendrick*, 40 Miss. at 390.

[19] *Id.* at 391.

[20] 42 Miss. 607 (1869).

$3275 for the plaintiff, who was carried six to eight feet beyond his platform destination at Terry.[21] Noting that the plaintiff proved no injury to his health or person nor any pecuniary loss, the court stated, "To warrant a jury in finding a verdict for exemplary or punitive damages, either malice, violence, fraud, or oppression must be shown to have mingled in the acts complained of."[22] Furthermore, the court reasoned:

> The power of giving exemplary damages should be exercised with great caution.
>
> A jury should be watchful that their verdict should not be so extravagant as to indicate that they have assumed the office of avengers of the plaintiff's wrongs, without due consideration of any apology or explanation for the defendant's conduct, which, to some extent exists, in all cases.[23]

The court concluded that the jury in this case "consulted their prejudices against corporations rather than their duty as impartial arbiters between the parties litigant."[24]

The negligent transportation cases established two other principles of punitive damage law: where proof fails to warrant punitive damages, "it is the duty of the court to inform the jury, when requested so to do, that they cannot inflict punitory damages"[25] and that "punitive damage [is] only allowed for the public benefit [and] . . . never . . . for the purpose of enriching the injured party."[26]

---

[21] *Statham*, 42 Miss. at 613.

[22] *Id.* at 611.

[23] *Id.* at 626.

[24] *Id.* at 630. Before relying on this case, one must consider the effect of an 1896 case which purported to overrule an entire volume of the Mississippi Reports. *See* Lusby v. Kansas City, M. & B.R., 19 So. 239, 242 (Miss. 1896). Refusing to follow another case in that volume, the court said:

> The case has no binding authority upon us, nor does the doctrine of stare decisis have any application in the case referred to, nor in any other case found in the so-called 42 Miss. The opinions found in that volume are the utterances of a tribunal appointed by the military satrap, who then ruled in a prostrate commonwealth, and have no other binding authority upon us than that each case therein must be regarded as res adjudicata.

Lusby, 19 So. at 242.

[25] *Scurr*, 59 Miss. at 463.

[26] *Hardie*, 55 So. at 970.

Heightened scrutiny of punitive damage awards in the negligent transportation cases did not deter litigants from seeking punitive damage against railroads in other circumstances. For instance, the supreme court affirmed the imposition of punitive damage against a railroad in *Yazoo & Mississippi Valley Railroad v. Williams*,[27] where the conductor ejected the plaintiff from a train short of his destination, using "violent and insulting language" and assaulting the plaintiff with a metal ticket punch.[28] The court approved a jury instruction which authorized the jury to return a punitive damage award in such amount as they might "see fit," but not to exceed the sum demanded.[29] In so holding, the court stated that "exemplary damages [are] solely within the discretion of the jury, and, no matter what the sum of their finding might be, interference therewith, unless for exceptional causes, is discouraged. . . . [T]he courts should scrupulously avoid any undue interference with their prerogative."[30] The court, however, cautioned against a jury which:

> went beyond their duty as protectors of the public and suffered themselves to be swayed by passion or led away by prejudice. In such extreme cases, reluctant as are the courts to disturb any finding of a jury awarding punitory damages, they will intervene in order to prevent the power of the jury being converted into an instrument of oppression.[31]

Likewise, the supreme court approved a jury award of $6000 to the plaintiff in *Yazoo & Mississippi Valley Railroad v. May*,[32] where an agent of the defendant pushed the plaintiff out of a railway station door while verbally insulting him.[33]

---

[27] 39 So. 489 (Miss. 1905).

[28] *Williams*, 39 So. at 489.

[29] *Id.* at 492.

[30] *Id.* at 491.

[31] *Id.* at 492.

[32] 61 So. 449 (Miss. 1913).

[33] *May*, 61 So. at 449; *see also* New Orleans, J. & G.N. R.R. v. Allbritton, 38 Miss. 242, 248 (1859) (imposing punitive damages on defendant when plaintiff suffered injuries resulting from collision of two trains).

B. Other Carriers for Hire

Other purveyors of persons and property for hire were also subject to punitive damage claims. In *Heirn v. M'Caughan*,[34] a steamship firm was assessed punitive damage for failure to stop in Pascagoula as advertised.[35] The defense that the Pascagoula landing was not made because of low tide and high wind was said to be for the jury to determine. Likewise, punitive damage was allowed against a steamship firm which attempted to charge storage for goods shipped to the plaintiff but not delivered on a trip down river as contracted.[36] In *Southern Express Co. v. Brown*,[37] the court affirmed a $5000 verdict including punitive damage, where an express wagon rolled over and injured the plaintiff.[38] The court held the company defendant liable as principal for the act of its employee/agent.[39]

C. The Cotton Industry

Not all deep pockets were attractive punitive damage targets. The pervasive control of "King Cotton" over the economy, politics and society of the state probably insulated those in that business from the punitive claims to which the railroad companies seemed so vulnerable. However, a handful of the punitive damage cases in the late 1800's did involve the cotton industry. For instance, in *Jamison v. Moon*,[40] the supreme court found that although the defendant removed the plaintiff's cotton from its shelter, the removal was by mistake and did not warrant punitive damage because the removal could not be characterized as accompanied "by oppression, ill-will or wantonness."[41] The court did affirm, however, an award of punitive damage in *Storm v. Green*,[42] where the plaintiff attempted to sell cotton pledged to the defendant, whose agents forcibly took the same from the plaintiff, "uttering profane oaths, directed to the plaintiff, a minister of the gospel."[43]

---

[34] 32 Miss. 17 (1856).

[35] *Heirn*, 32 Miss. at 21.

[36] Silver v. Kent, 60 Miss. 124, 130 (1882).

[37] 7 So. 318 (Miss. 1890).

[38] *Brown*, 7 So. at 319.

[39] *Id.*; *see also*, New Orleans, J. & G.N. R.R. v. Bailey, 40 Miss. 395, 453-54 (1866) (stating that railroad company was responsible in exemplary damages for negligent acts of its agents); New Orleans, J. & G.N. R.R. v. Allbritton, 38 Miss. 242, 277-78 (1859) (holding defendant responsible for acts of agent committed while in his legal employ); New Orleans, J. & G.N. R.R. v. Hurst, 36 Miss. 660, 665 (1859) (imposing damages on defendant for acts of company's agent); Vicksburg & J. R.R. v. Patton, 31 Miss. 156, 197 (1856) (imposing punitive damages on defendant for wanton mischief of his engineer).

[40] 43 Miss. 598 (1870).

In *Black v. Robinson*,[44] the firm of T.M. Black and others took possession of cotton on which it held a lien from David Warner. Warner sold the cotton to the plaintiff, C.L. Robinson. The court reversed a $100 judgment for actual and punitive damage due to the absence of fraud, oppression or willful wrong by the defendant in taking possession of the cotton.[45]

In *Robinson & Pattison v. Goings*,[46] Robinson's business partner, Pattison, seized the plaintiff's wagon and team and three bales of cotton, mistakenly believing that his business held a lien on the cotton.[47] The court affirmed a $125 judgment for actual and punitive damage in favor of the plaintiff. The court held the business partner, Robinson, liable on account of Pattison's actions as an agent for the firm, despite the fact that Robinson took no part in the alleged wrongful acts.[48]

---

[41] *Jamison*, 43 Miss. at 602-03. An additional reason ascribed by the court for its reversal of the plaintiff's trial court verdict was that the verdict called for the judgment to be satisfied in gold. The court noted that the transaction giving rise to this litigation occurred after passage by Congress of the Legal Tender Act, thereby rendering currency a legal means of satisfaction of the judgment. *Id.*

[42] 51 Miss. 103 (1875).

[43] *Storm*, 51 Miss. at 109.

[44] 61 Miss. 54 (1883).

[45] *Black*, 61 Miss. at 59-60.

[46] 63 Miss. 500 (1886).

[47] *Goings*, 63 Miss. at 501.

[48] This case was cited with approval in Duggins v. Washington, 632 So. 2d 420 (Miss. 1993). However, dissenting on denial of petition for rehearing, Justice Lee correctly observed that only a defendant guilty of punitive conduct should be exposed to a punitive award—a defendant not guilty of punitive conduct cannot be charged with the punitive conduct of another. *See infra* note 62 and accompanying text.

D. *Telegraph, Express and Telephone Companies*

As Mississippi progressed into the twentieth century, a new favorite deep-pocket target emerged: the telegraph, express and emerging telephone companies.[49] Like the railroads, the Mississippi Constitution directed the Legislature to pass laws preventing abuses by such companies.[50] It declared them "common carriers" with heightened legal duties to the public.[51] The supreme court, in *Cumberland Telegraph & Telephone Co. v. Hobart*,[52] expressed the rationale for this heightened duty:

> [The defendant] is a public service corporation without competition, monopolistic in nature, and the patrons have no choice but to accept its service, and they have not the privilege of selecting to do business with a competitor because there is no competitor, and for this reason the rights of the public should be carefully guarded against oppressive methods used for the purpose of collecting unjust demands. The necessities of the law must meet modern conditions.[53]

The *Hobart* court allowed the plaintiff to recover damages for inconvenience in having his telephone wrongfully disconnected, but refused to consider punitive damage,[54] citing *Cumberland Telegraph & Telephone Co. v. Baker*,[55] in support of its decision. In *Baker*, the court reversed a jury verdict of $200, including punitive damage, for wrongful removal of telephone service because there was no evidence of wanton, willful, oppressive or malicious conduct by the defendant.[56] In an earlier decision, the court had affirmed a $1000 verdict, including punitive damage, on substantially the same proof as that in *Hobart* and *Baker*.[57] In that case the defendant had failed to deliver a telegram advising the plaintiff of her husband's death.[58] The court, however, ordered a $100 remittitur because proof at trial did not show the husband's body had been exhumed and reburied in Batesville, for which the $100 had been allowed.

---

[49] 2 RICHARD A. MCLEMORE ET AL., A HISTORY OF MISSISSIPPI 371 (1973).

[50] MISS. CONST. art VII, § 186.

[51] *Id.* § 195.

[52] 42 So. 349 (Miss. 1906).

[53] *Hobart*, 42 So. at 351.

[54] *Id.*

[55] 37 So. 1012 (Miss. 1905).

[56] *Baker*, 37 So. at 1013.

[57] Western Union Tel. Co. v. Watson, 33 So. 76, 77 (Miss. 1902).

A directed verdict for the defendant was reversed in *Steinberger v. Western Union Telegraph Co.*[59] The telegraph company did not offer proof to excuse its failure to deliver a telegram and the plaintiff was held entitled to go to the jury on the question of whether such failure was so willful and wanton as to justify punitive damage.[60] However, in most instances where the trial court allowed juries to return punitive damage verdicts for wrongful telephone disconnection, failure to deliver messages or delivery of an erroneous message, the cases were reversed on appeal for lack of evidence of willfulness or wanton conduct by the defendant.[61]

The court reversed punitive damage awards against two telegraph companies in *Western Union Telegraph Co. v. McKinney*,[62] because they had been imposed jointly against both companies.[63] In reversing, the court stated that each defendant "acted independently of the other in forwarding this telegram, and neither is responsible for the acts of the other with reference thereto; and if either of them acted in such manner as to justify the imposition of punitive damages against it, the other is not responsible therefor."[64]

---

[58] *Watson*, 33 So. at 76.

[59] 52 So. 691 (Miss. 1910).

[60] *Steinberger*, 52 So. at 691. As late as 1917, *Steinberger* was cited as authority for the view that punitive damages could be recovered even in the absence of actual damages. *See* Johnson v. Western Union Tel. Co., 76 So. 738, 738 (Miss. 1917). The rule, however, is clearly to the contrary. *See infra* notes 281-82 and accompanying text.

[61] *See, e.g.*, Western Union Tel. Co. v. Koonce, 72 So. 893, 894 (Miss. 1916) (denying punitive damages based on mere facial expressions, stating that court "cannot safely impute insult and oppression from the looks of a person. If this were held to be the rule, the right to recover punitive damages would be so enlarged as to permit enormous verdicts, resulting in grave injustice to many, merely on account of appearances."); Western Union Tel. Co. v. Ragsdale, 71 So. 818, 821 (Miss. 1916) (finding that mistakes made by defendant's servants did not result in willful or gross negligence); Cumberland Tel. & Tel. Co. v. Paine, 48 So. 229, 230 (Miss. 1909) (holding that elements of willful, malicious, fraudulent, or oppressive wrongdoing were totally lacking); Cumberland Tel. Co. v. Allen, 42 So. 666, 667 (Miss. 1907) (finding that defendant, though negligent, was not guilty of willful conduct).

[62] 67 So. 647 (Miss. 1915).

[63] *McKinney*, 67 So. at 647.

Like the railroad negligent transportation cases, these telegraph, telephone and express company cases are essentially contract actions, alleging tortious conduct to justify punitive damage. However, the supreme court did not appear to have clearly articulated the distinction until its decision in *American Ry. Express v. Bailey*.[65] In *Bailey*, the court stated:

> The only other question for decision is whether or not, under the facts, the appellee was entitled to recover punitive damages. In the execution of the contract here involved, the appellant was engaged in a purely commercial business, and the contract between the parties was simply one to promptly transmit and pay money, and this suit is one for the breach of that contract. The general rule is that punitive damages are not recoverable for the breach of a contract, unless the breach is attended by some intentional wrong, insult, abuse, or gross negligence, which amounts to an independent tort. While the evidence in the case at bar shows negligence on the part of the forwarding company, it negatives any intentional or willful wrong, or gross negligence, which amounts to the commission of a tort.[66]

E. Electric Utilities

The Great Depression of the 1920's and 30's certainly had its impact in Mississippi,[67] perhaps explaining the relatively few punitive damage cases from that era. It may also explain why the emerging electric utility companies attracted relatively little judicial attention. By 1923 the Mississippi Power & Light Company had combined the electric power systems of Greenville, Jackson and Vicksburg. The Mississippi Power Company was created in Gulfport and along the Mississippi Gulf Coast and had begun its expansion in the southern and eastern areas of the state.[68]

---

[64] *Id.*

[65] 107 So. 761 (Miss. 1926).

[66] *Bailey*, 107 So. at 763 (citations omitted). In an earlier decision, the supreme court stated that punitive damages were not recoverable in a breach of contract claim, unless the act constituting the breach of contract also constituted the commission of a tort. Hood v. Moffett, 69 So. 664, 666 (Miss. 1915). *Hood* was a medical malpractice case where the court said the jury should not have been allowed to award punitive damages:

> This is a suit for damages alleged to have been sustained because of the breach of a contract, and the rule is . . . that such damages are not recoverable in such an action unless the act or omission constituting the breach of the contract amounts also to the commission of a tort.

Hood, 69 So. at 666.

[67] 2 MCLEMORE, *supra* note 49, at 197.

Although the monopolistic nature of these emerging electric utility companies and that of the telephone companies discussed in *Hobart* were similar, the judicial attitude was markedly different. When the supreme court considered a 1930 case alleging wrongful deprivation of electric lights, it noted:

> Appellee's whole case is built on the fact that she was deprived of electric lights for something like an hour, after night, while she was confined in childbirth. Sufficient candles were present, however, and were used instead of the electric lights. The court knows, as everybody knows, that a considerable proportion of the people of this state still do not have electric lights, and that their children oftentimes are born by candlelight or lamplight, and probably some of them by the light of pine knots.[69]

The court reversed the lower court award of punitive damage and rendered judgment for the defendant in *Mississippi Power Co. v. Byrd*,[70] finding no evidence of willful or wanton conduct on the part of the defendant in wrongfully terminating the plaintiff's electric service.[71]

F. *The Highway Era*

As the Depression waned, Mississippi became the first state to address its beleaguered governmental revenues by enacting a state sales tax. But it was the last state to adopt an overall plan for a highway system. Finally, in 1936 the Legislature earmarked $42.5 million for a system of primary and secondary roads connecting all eighty-two Mississippi counties.[72] The program was underway early in Governor Hugh White's administration and expanded on his recommendation in 1938.[73] Along with state highways and increased automobile and truck traffic came numerous accidents and a whole new era of litigation.

---

[68] 2 McLemore, *supra* note 49, at 236.

[69] Mississippi Power Co. v. Harper, 145 So. 887, 887 (Miss. 1933).

[70] 133 So. 193 (Miss. 1931).

[71] *Byrd*, 133 So. at 194; *see also* Doherty v. Mississippi Power Co., 173 So. 287, 289 (Miss. 1937) (disallowing punitive damages because evidence established "mere negligence" and not "malice, fraud, oppression, willful wrong, or gross negligence").

Some of the early highway cases clearly demonstrate an attitude by the court to implement policies which would curb the mayhem resulting from increased availability of automobiles, trucks and highway traffic. Thus, in *Hadad v. Lockeby*,[74] the court affirmed punitive damages based on a defendant's excessive speed, estimated at thirty-five to forty miles per hour in a twenty miles per hour zone.[75] The court stated:

> In view of the numerous decisions involving personal injuries by the operation of automobiles at a high rate of speed and without exercising caution, we think it imperative to hold operators of automobiles to prudence and care in the operation of their machines. With modern, high-powered machines running over improved highways, often the rate of speed is not noticed by persons riding in the cars. These machines upon the highways are extremely dangerous to others using the highways, and it is highly desirable that all understand that they will be liable and responsible for injuries resulting from their negligence. The lives and limbs of persons should be safeguarded, and something should be done to reduce accidents to a minimum.[76]

Likewise, in *Dame v. Estes*,[77] speed was held to warrant a punitive damage instruction, where the defendant was estimated to be driving at not less than fifty miles per hour in a thirty mile per hour zone in the City of Gulfport.[78] But in *Maupin v. Dennis*,[79] the court reversed the lower court's punitive damage award, and held that, although driving at excessive speeds could warrant the jury's verdict for actual damages, the appellant's conduct "did not indicate any willful or wanton disregard for the safety or property of others."[80] It appears that, in *Maupin*, the court accepted the fact that drivers exceed the speed limit without malicious intent, and thereby softened the alarm sounded by the *Hadad* court over the "modern, high-powered machines" which were "extremely dangerous to others using the highways."[81]

---

[72] GEORGE B. TINDALL, THE EMERGENCE OF THE NEW SOUTH 492 (1967).

[73] 2 MCLEMORE, *supra* note 49, at 115-16.

[74] 169 So. 691 (Miss. 1936).

[75] *Hadad*, 169 So. at 693.

[76] *Id.* at 693-94.

[77] 101 So. 2d 644 (Miss. 1958).

As with the railroads, telegraph, telephone and express companies, plaintiffs in highway cases were most often attracted to the deep pockets of truck lines and other big companies using the highways to transport their products. The court in *Sandifer Oil Co. v. Dew*[82] noted that "[t]hroughout the length and breadth of this State similar transport trucks are daily traveling our highways and making deliveries of gasoline. Those who handle such dangerous agencies should be made to know the standard of care which is required of them."[83]

Two of the most often cited punitive damage cases, *Teche Lines, Inc. v. Pope*[84] and *Fowler Butane Gas Co. v. Varner*,[85] are of this type. In *Teche Lines*, the supreme court discussed its role in reviewing the amount of a punitive damage award, stating:

---

[78] *Dame*, 101 So. 2d at 645. The court also considered the appellee's failure to stop for a stop sign as lending weight to a finding of gross negligence. *Id.*

[79] 175 So. 2d 130 (Miss. 1965).

[80] *Maupin*, 175 So. 2d at 131.

[81] *Hadad*, 169 So. at 694. In Mayfield v. Johnson, 202 So. 2d 630 (Miss. 1967), the court similarly held that negligent conduct did not warrant punitive damages, stating:

> If under the facts of this case it can be properly held that punitive damages would be allowed, then there would be a deluge of cases seeking punitive damages whenever one vehicle was struck from the rear by another vehicle which was being driven at a speed in excess of the speed allowed and when the driver of the vehicle was not keeping a sharp lookout.

Mayfield, 202 So. 2d at 631. Although negligent, the court found such conduct not to be so gross as to constitute willfulness. *Id.*

[82] 71 So. 2d 752 (Miss. 1954).

[83] *Dew*, 71 So. 2d at 759.

[84] 166 So. 539 (Miss. 1936).

[85] 141 So. 2d 226 (Miss. 1962).

> The state of the record is such that had there been no allowance of punitory damages and the verdict had been for half the stated amount as compensatory damages, we would not be authorized to interfere. Assuming, therefore, that half, or even more than half, the amount of the verdict represents a punitory award, we are still not authorized to interfere.[86]

With respect to the rule that the amount of punitive damages was "solely within the discretion of the jury, and no matter what the sum" the courts may not interfere without "exceptional" cause,[87] the *Teche Lines* court stated:

> Of course, it was not meant by the broad language . . . that as to punitory damages the courts are not required to exercise a supervisory power over such verdicts in the manner as they are in regard to compensatory verdicts. [N]or in reaffirming that language do we mean to withdraw in any measure from the constitutional duties of supervision imposed upon us. We must keep all verdicts within the bounds of reason, measured according to legal standards, both in the matter of the evidence upon which the verdict is based and in the amount of the verdict; but to bring the force of this supervisory power into operation, particularly as to punitory verdicts, the amount allowed must be clearly beyond reason, all things properly before the jury calmly considered. We cannot say that upon the facts of this case the amount allowed is beyond all calm reason, and we therefore cannot interfere.[88]

The *Fowler Butane* court defined punitive damages and the type of conduct for which these damages could be awarded:

> Punitive damages, "exemplary" damages, and "vindictive" damages are in legal contemplation synonymous terms, and sometimes called "smart money." Punitive damages are "added damages" and are in addition to the actual or compensatory damages due because of an injury or wrong. The kind of wrongs to which punitive damages are applicable are those

---

[86] *Teche Lines*, 166 So. at 540 (awarding punitive damages because bus driver was grossly negligent for failing to stop at train crossing).

[87] Yazoo & M.V.R. v. Williams, 39 So. 489, 491 (Miss. 1905).

[88] *Teche Lines*, 166 So. at 540-41 (citation omitted).

> which, besides the violation of a right or the actual damages sustained, import insult, fraud or oppression and not merely injuries but injuries inflicted in the spirit of wanton disregard for the rights of others. In order to warrant the recovery of punitive damages, there must enter into the injury some element of aggression or some coloring of insult, malice or gross negligence, evincing ruthless disregard for the rights of others, so as to take the case out of the ordinary rule.[89]

In *Planters Wholesale Grocery v. Kincade*,[90] the jury found the defendant corporation liable for $30,000 actual and punitive damages when its delivery truck driver had a flat tire and left the truck blocking part of the highway without warning while repairs were being made.[91] On appeal, the supreme court affirmed and held that submission of the question of punitive damages was proper because of the issue of gross negligence on the part of the truck driver. Attempting to define gross negligence, the court stated that "no precise definition" exists, "'but one of the approximate definitions may be thus expressed: Gross negligence is that course of conduct which, under the particular circumstances, discloses a reckless indifference to consequences without the exertion of any substantial effort to avoid them'."[92]

A 1952 supreme court case, where the defendant was an individual, reversed a punitive damage award and provided a more restricted view of conduct warranting the assessment of punitive damage.[93] The court stated that the defendant's "negligence may have been gross negligence but it was not willful; it was not wanton; and it was not such as to indicate an utter disregard for the safety of [the plaintiff] or the other children who were riding on the fenders of the car with" the plaintiff.[94]

---

[89] *Fowler Butane*, 141 So. 2d at 233 (citations omitted).

[90] 50 So. 2d 578 (Miss. 1951).

[91] *Kincade*, 50 So. 2d at 580.

[92] *Id.* at 584 (quoting *Teche Lines*, 166 So. at 540).

[93] Belk v. Roasamond, 57 So. 2d 461-62, 468 (Miss. 1952).

[94] *Belk*, 57 So. 2d at 468.

In *St. Regis Paper Co. v. Seals*,[95] an automobile driven by a St. Regis employee in the course of his employment injured the plaintiff. The court reversed the $25,000 jury verdict and remanded to the trial court because the trial court improperly allowed the jury to consider punitive damages. On retrial, the plaintiff secured a $200,000 verdict—without punitive damage—which the court affirmed, conditioned on a remittitur to $75,000.[96] This case illustrates the problem created by the prevalent practice at the time of allowing juries to return general verdicts, including both actual and punitive damage, without separately finding the amount of each. Obviously, the supreme court would have affirmed the original $25,000 verdict had it been returned only as actual damages.

Both the Mississippi Supreme Court and the United States Court of Appeals for the Fifth Circuit noted the problem and suggested it be corrected.[97] The trial courts and bar heeded the message and the general practice in recent years in both state and federal court has been to submit a verdict form with separate findings for actual and punitive damages. It is likely that adoption of the Mississippi Rules of Civil Procedure effective January 1, 1982 (Rule 49 specifically describes the special verdict) had its influence in directing the trial bar away from the general verdict form.[98]

---

[95] 211 So. 2d 547 (Miss. 1968), *remanded*, 236 So. 2d 388 (Miss. 1970), *overruled by* Lane v. Webb, 220 So. 2d 281, 286 (Miss. 1969).

[96] Seals v. St. Regis Paper Co., 236 So. 2d 388, 393 (Miss. 1970).

[97] The Fifth Circuit, in a Mississippi case, commented on the problem in a case involving yet another trucking line. In Anderson v. Eagle Motor Lines, Inc., 423 F.2d 81 (5th Cir. 1970), the defendant's tractor-trailer blocked the highway while attempting to turn around. The district court entered a general verdict, including actual and punitive damages, in the amount of $162,000. On appeal, the appellant argued that the trial court erred in not requiring the jury to find separate actual and punitive damage verdicts. The Fifth Circuit affirmed, noting that it had "occasionally decried the 'impenetrable uncertainty' of a general verdict," but would not reverse on that ground in the instant case. *Anderson*, 423 F.2d at 85.

Furthermore, in Capital Transport Co. v. McDuff, 319 So. 2d 658 (Miss. 1975), the Mississippi Supreme Court affirmed a general verdict (including actual and punitive damages) in the amount of $50,000, but noted:

> We do call to the attention of trial judges and attorneys that it would be appropriate (in cases where both actual and punitive damages are sought) to insure that jury verdicts reflect precisely the amount of actual damages and the amount of punitive damages awarded. In such cases the jury should be instructed to cause their verdict to reflect separate amounts for actual and punitive damages. This would obviously have the salutary effect of making lighter the burden of this Court (and trial courts) when considering questions related to the adequacy, excessiveness, or validity of jury verdicts.

McDuff, 319 So. 2d at 662.

G. The Mother Lode — Bad Faith Insurance Claims

In the late 1970's, plaintiffs discovered the mother lode of deep-pocket defendants with bad faith claims against insurance companies. Beginning with *Standard Life Insurance Co. v. Veal*,[99] the bad faith insurance cases ushered in a new era of litigation resulting in a fairly well-defined body of law as to what constitutes an "independent tort" in the context of refusal by an insurance company to pay an insured's claim.

Early punitive damage cases, more frequently than not, involved contract claims with little or no discussion of the nature of the underlying claim.[100] In cases which discussed the propriety of awarding punitive damages in contract cases, the courts typically held that punitive damages should not be awarded unless the contract breach amounted to the "commission of a tort,"[101] or an "independent tort."[102]

One law journal commentator has described the bad faith litigation initiated in *Standard Life Co. v. Veal* as "a hybrid tort (contract) action, the independent tort of bad faith," allowing recovery of punitive damages where an insurance company denies a legitimate claim of an insured without an arguable reason and in doing so acts with malice or gross negligence or reckless disregard for the rights of others.[103] Not since the early railroad cases had plaintiffs found as vulnerable a target as the insurance companies. And never had punitive damage recoveries been so high.

---

[98] *See* MISS. R. CIV. P. 49 (special verdict).

[99] 354 So. 2d 239 (Miss. 1977).

[100] *See supra* notes 6-71 and accompanying text.

[101] Hood v. Moffett, 69 So. 664, 666 (Miss. 1915).

[102] American Ry. Express v. Bailey, 107 So. 761, 763 (Miss. 1926). In another leading case, D.L. Fair Lumber Co. v. Weems, 16 So. 2d 770 (Miss. 1944), the court stated:

> Nor may escape be made by the contention that the duty which here was so willfully and oppressively flouted was one arising by contract and that punitive damages may not be recovered for a mere contract violation. We have held, and now reaffirm it, that punitive damages may be recovered for breach of contract when the breach is attended by such gross negligence or willful wrong as to amount to a tort.

Weems, 16 So. 2d at 773.

From the relatively modest $25,000 punitive award affirmed by the *Veal* court in 1977, the court found itself affirming $1.6 million in punitive damages with only $20,000 in underlying actual damage in the 1985 case of *Bankers Life & Casualty Co. v. Crenshaw.*[104] Writing for the court, Justice Sullivan noted that the defendant had reported total assets of $1.3 billion and net assets of approximately $294 million,[105] and stated:

---

[103] Micheal D. Herrin, Comment, *The Availability of Extracontractual Damages for Emotional Distress and Attorneys' Fees in Bad Faith Breach of Insurance Contract Cases*, 59 MISS. L.J. 537, 538 (1989). This comment states that "[i]n the eleven years since *Veal*, the case law on the recovery of punitive damages in an insurance contract setting has become quite refined." *Id.* at 539 (footnote omitted). The basis for award of punitive damages in the insurance context is beyond the scope of this article; however, it is clear that policy considerations involved in the unique relationship between insured and insurer has driven the development of this body of law. The California cases which premiered the bad faith doctrine discussed the insurer's duty as being one of "dealing fairly and in good faith" with its insureds. JOHN C. MCCARTHY, PUNITIVE DAMAGES IN BAD FAITH CASES § 1.8, at 25 (4th ed. 1987) (quoting Richardson v. Employer's Liab. Assurance Corp., 102 Cal. Rptr. 547, 552 (1972)). The Mississippi Supreme Court in *Veal* articulated some of the underlying policies inherent in the insurance contract context which are not necessarily present in other contract relationships. Specifically, the court stated:

> If an insurance company could not be subjected to punitive damages it could intentionally and unreasonably refuse payment of a legitimate claim with veritable impunity. To permit an insurer to deny a legitimate claim, and thus force a claimant to litigate with no fear that claimant's maximum recovery could exceed the policy limits plus interest, would enable the insurer to pressure an insured to a point of desperation enabling the insurer to force an inadequate settlement or avoid payment entirely.

Veal, 354 So. 2d at 248. The bad faith insurance cases should not govern in other types of contract relationships without careful scrutiny of the underlying policies giving rise to the "hybrid tort (contract)" bad faith insurance cases. Herrin, *supra*, at 538; *see infra* notes 148-49 and accompanying text.

[104] 483 So. 2d 254 (Miss. 1985), *aff'd*, 486 U.S. 71 (1988); *see infra* notes 188-212 and accompanying text.

[105] *Crenshaw*, 483 So. 2d at 278.

> Our general rule is that a damage award is so excessive that it should be altered or amended when it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience. This shock must be experienced by the judicial conscience, not the actual conscience of the members of this Court.
>
> . . . .
>
> . . . [I]t is difficult to imagine that, consistent with the rules of law recited above, the judicial conscience could be shocked by a punitive damages assessment which is less than 1% of the financial net worth of the defendant. However high that amount may "seem," it may not, consistent with our rules of law in the area, be said to shock the judicial conscience.[106]

In dissent, Justice Hawkins stated that the majority had considered only the net worth of the defendant, and that three additional factors must be balanced in evaluating a punitive damage award: "punishment, public example and reward to the plaintiff."[107] He stated he could not "agree with the concept the bigger they are the more we ought to zap them."[108] The jury in the instant case, he contended, "paid no more attention to [setting a public example and appropriate reward to the plaintiff] in reaching their verdict than to some Jackson County swamp rabbit."[109] On the issue of punishment, he asserted that in addition to net worth, Mississippi jurisprudence required consideration of other factors including "malice, motive, the injury intended, [and the] public sense of justice and propriety."[110] He would have reduced the punitive damages award to $750,000.[111]

The 80 to 1 ratio of punitive to actual damage affirmed in *Crenshaw* escalated to 800 to 1 in *Employers Mutual Casualty Co. v. Tompkins*.[112] The court reduced a $50,000 actual damages award to $500, the contractual limit of the insurance defendant's liability, but affirmed the jury's $400,000 punitive damages award.[113] The court noted:

---

[106] *Id.* at 278-79 (citations omitted).

[107] *Id.* at 279-80 (Hawkins, J., dissenting).

[108] *Id.* at 280 (Hawkins, J., dissenting).

[109] *Id.* at 281 (Hawkins, J., dissenting).

[110] *Crenshaw*, 483 So. 2d at 281-82 (Hawkins, J., dissenting).

[111] *Id.* at 282 (Hawkins, J., dissenting).

[112] 490 So. 2d 897 (Miss. 1986).

> Heretofore in appraising punitive damages we have sometimes expressed our reasoning through the use of mathematical formulas, such as contrasting the sum of the actual damages to the punitive damages and, comparing the punitive damage award to the net worth of the defendant. At times we have also indulged verbal equations by referring to "a sum so great that at first blush it shocks the judicial conscience" when compared with other awards in different cases. These formulas are attempts to illustrate the court's thoughts in either accepting or rejecting the sum of the award. They do not, and probably cannot, express an exact rule for the determination.
>
> Although inexact, we think the better formula for review is to give due consideration to the degree and nature of transgression from reasonable and lawful practices and the likely harmful effect upon the individual litigant and the public.[114]

The court reiterated that Mississippi "case law is to the effect that the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury."[115] Justice Hawkins again dissented, stating:

> I reject the meager role this Court has assigned itself to play in the majority opinion in *Bankers Life v. Crenshaw*, and the present majority in the review of the amount of punitive damage awards.
>
> . . . .
>
> Punitive damages imposed without restraint will not survive . . . but rather themselves be eliminated by Legislative action before corrective statutory measures are taken to regulate the insurance companies.[116]

The court restrained itself in *Mutual Life Insurance Co. v. Estate of Wesson*,[117] affirming an actual contractual damage award of $87,136 but ordering a remittitur of an $8 million punitive damage award to $1.5 million. The court reiterated the traditional Mississippi factors considered in awarding punitive damages[118] and also noted several factors from a Texas Court of Appeals decision which listed:

---

[113] *Tompkins*, 490 So. 2d at 909.

[114] *Id.* at 907.

[115] *Id.* at 908.

[116] *Id.* at 910 (Hawkins, J., dissenting).

[117] 517 So. 2d 521 (Miss. 1987), *cert. denied*, 486 U.S. 1043 (1988).

> (1) nature of the wrong, (2) character of the conduct involved, (3) degree of culpability of wrongdoer, (4) situation and sensibilities of parties concerned, (5) extent to which such conduct offends a public sense of justice and propriety, and (6) the proportion that the punitive damage award bears to the compensatory damage award.[119]

The *Wesson* opinion seems to indicate that the court considered the traditional Mississippi factors, as well as those enunciated in the Texas case in finding that the remittitur should be ordered.[120] The court also noted that it was aware that the defendant's net assets were valued at $8 billion.[121] Justice Anderson dissented from the remittitur, noting that the defendant had a net worth of nearly $448 million and that the $8 million punitive damage award represented 1.785% of its net worth.[122]

While the *Wesson* court did not articulate a specific rule for appellate consideration of the amount of a punitive award, another 1987 bad faith decision reiterated the "shock the judicial conscience" standard, stating:

> We are not authorized to disturb a jury verdict regarding punitive damages because it "seems too high" or "seems too low." Only where the verdict is so excessive that it evinces

---

[118] *Wesson*, 517 So. 2d at 532. These traditional considerations set out by the court included: (1) the amount necessary to punish and deter the defendant; (2) the amount necessary to make an example of the defendant's conduct and deter others; (3) the financial worth of the defendant; and (4) a reward to the plaintiff for public service in bringing the wrongdoer to account. *Id.*

[119] *Id.* (citing Ford Motor Co. v. Durrill, 714 S.W.2d 329, 346 (Tex. Ct. App. 1986)).

[120] *Id.*

[121] *Id.* at 533 n.4.

[122] *Id.* (Anderson, J., dissenting). Justice Anderson contrasted the rule for compensatory damages with the rule for punitive damages. Compensatory damages, he noted, are "confined or restricted to consideration of the facts in evidence," but punitive awards are in the "discretion, sound judgment and combined wisdom of jurors drawn indiscriminately from every walk of life," and that the court should not "get into the business of regulating punitive damages." *Id.* at 540-41 (Anderson, J., dissenting).

> passion, bias and prejudice on the part of the jury so as to shock the judicial conscience may we interfere.[123]

In *Andrew Jackson Life Insurance Co. v. Williams*,[124] the fact that the review standard—and the jury's latitude—was unquestionably broad was emphasized by the court.[125] The court affirmed an award of $28,000 actual and $200,000 punitive damages, rejecting the argument that the punitive award of close to 5.3% of the defendant's net worth was too great in light of the *Wesson* decision which, after remittitur, approved a punitive award equivalent to .33% of that defendant's net worth.[126] The court stated:

> Andrew Jackson seems to believe that this Court has pronounced a "hard and fast" rule of percentages to be applied in cases involving punitive damages. This is clearly not the case. . . . Indeed, no "yardstick" could possibly be created to measure such awards since totality of circumstances attendant a case varies on an *ad hoc* basis.[127]

In the case of *Harvey-Latham Real Estate v. Underwriters at Lloyd's*,[128] Justice Blass criticized the absence of a reliable jury and review standard in yet another bad faith case following *Andrew Jackson* in 1990.[129] Reversing summary judgment for the defendant, and noting that the case might go to the jury on the issue of punitive damage on remand, Justice Blass wrote:

> Although it has been frequently stated that the amount of punitive damages is a matter solely within the authority and discretion of the jury, it is unclear what formula is used to reach the amount.
>
> . . . .
>
> It is imperative that some parameters be developed for the guidance of juries and courts fixing the amount of punitive damages. The present undefined and open-ended status breeds disrespect for the law and for the courts and cannot be

---

[123] Life Ins. Co. v. Allen, 518 So. 2d 1189, 1194 (Miss. 1987).

[124] 566 So. 2d 1172 (Miss. 1990).

[125] *Andrew Jackson*, 566 So. 2d at 1190.

[126] *Id.* at 1191.

[127] *Id.*

[128] 574 So. 2d 13 (Miss. 1990).

[129] *Harvey-Latham*, 574 So. 2d at 16-17.

> defended in reasoned debate. Standards need to be developed which will result in reasonable similar consequences, given reasonably similar circumstances. This objective has not been seriously addressed by this Court, and by few in the nation. It is a legitimate judicial undertaking, and should be accomplished by finding a just resolution of the several cases that come before us, one at a time. When enough cases have been decided the rules shall have emerged. We do not write statutes.[130]

In one of the most recent bad-faith cases, *Valley Forge Insurance Co. v. Strickland*,[131] the court considered a $25,000 actual contract damages award and a $1 million punitive damages award assessed by a chancellor.[132] Affirming the punitive damages award, the court stated that "[n]o hard and fast rule exists for establishing the maximum amount of punitive damages awardable in any given case."[133] Noting that the award was 1.5% of the defendant's net worth, an amount "proportionately lower than in other similar cases," the court rejected the defendant's claim that it was entitled to a jury trial with respect to the bad faith punitive damages aspect of the litigation.[134]

H. What Next?

1. Commercial Cases

It is likely that the bad faith era is waning. Certainly the number of these cases reaching the Mississippi Supreme Court in the 1990's are of a lesser quantity than in the 1980's. Although not directed to any particular deep pocket industry, the punitive damages cases currently being addressed by the court appear to have taken a decidedly commercial turn. The court has held that a contract action governed by the Uniform Commercial Code could give rise to punitive damage where as in other contract cases, the breach is accompanied by such wrongful conduct as to constitute an independent tort.[135] Punitive damages have been affirmed by the supreme court against a bank for wrongfully applying trust funds held in a customer's account to reduce the customer's indebtedness to the bank.[136] In other recent cases arising in a commercial context, punitive damages were denied for alleged tortious breach of a gas purchase contract[137] and the plaintiffs unsuccessfully sought punitive damages for wrongfully making a secured loan to a person adjudicated *non compos mentis*[138] and for negligent filing of an estate fiduciary return.[139] In *Eselin-Bullock & Associates Insurance Agency v. National General Insurance Co.*,[140] an insurance agency sought punitive damages in connection with alleged wrongful termination of an agency agreement.[141] Alleged wrongful handling of securities investments was the basis for punitive damage claims in *Finkelberg v. Luckett*[142] and *FSC Securities Corp. v. McCormack*.[143]

---

[130] *Id.*

[131] 620 So. 2d 535 (Miss.), *cert. denied*, 114 S. Ct. 635 (1993).

[132] *Strickland*, 620 So. 2d at 538.

[133] *Id.* at 540-41 (citing *Andrew Jackson*, 566 So. 2d at 1191).

[134] *Id.* at 542.

The case of *Dynasteel Corp. v. Aztec Industries, Inc.*[144] presented the court with a default judgment on a garden variety open account case which included punitive damage.[145] Although the court correctly reversed and rendered the award of punitive damages, it noted that the plaintiff had pled "bad faith refusal to pay," discussing the case as if such a cause of action existed in the same context as a suit by an insured against an insurer.[146] The court rejected the punitive damage claim, noting that "in open account cases such as this . . . more often than not the failure to pay has more to do with inability to do so rather than obstinance. We have been unable to find any precedent for an award of punitive damages on an open account case."[147]

---

[135] Fedders Corp. v. Boatright, 493 So. 2d 301, 310 (Miss. 1986). The defendant argued that section 75-1-106(1) of the Mississippi Code precluded punitive damages. *Fedders*, 493 So. 2d at 311. That provision reads, in part, that "neither consequential or special nor penal damages may be had except as specifically provided in this code or by other rule of law." MISS. CODE ANN. § 75-1-106(1) (1972). The court interpreted punitive damages to fall within the ambit of an "other rule of law." *Fedders*, 493 So. 2d at 311.

[136] Central Bank v. Butler, 517 So. 2d 507, 512 (Miss. 1987).

[137] Southern Nat'l Gas Co. v. Fritz, 523 So. 2d 12, 20 (Miss. 1987), *cert. denied*, 493 U.S. 889 (1989).

[138] Defenbaugh & Co. v. Rogers, 543 So. 2d 1164, 1167 (Miss. 1989).

[139] Wirtz v. Switzer, 586 So. 2d 775, 783 (Miss. 1991).

[140] 604 So. 2d 236 (Miss. 1992).

[141] *Eselin-Bullock*, 604 So. 2d at 241.

[142] 608 So. 2d 1214, 1220 (Miss. 1992).

[143] 630 So. 2d 979, 979 (Miss. 1994).

[144] 611 So. 2d 977 (Miss. 1992).

[145] *Dynasteel*, 611 So. 2d at 984.

However, the court's discussion of the insurance "bad faith refusal to pay" cases is misleading. There is no underlying public policy argument[148] in the open account context, as in bad faith insurance cases, which argues for a "bad faith refusal to pay" doctrine.[149] If the court is to consider punitive damages in non-insurance refusal to pay cases, the correct analysis is whether the defendant's conduct is such as to constitute an independent tort and, if so, whether that conduct is accompanied by such fraud or malice as to warrant punitive sanction, not to borrow the "bad faith refusal to pay" language from the insured/insurer cases where unique public policy arguments have resulted in the development of a distinct body of law applicable only in cases between insurers and insureds.

2. *Back to the Old Favorites?*

As plaintiffs have groped for a new deep pocket target, some have returned to a couple of the old favorites. In *South Central Bell v. Epps*,[150] the plaintiff secured a verdict of $75,000 actual and $3 million punitive damage for wrongful disconnection of telephone service.[151] The supreme court reversed the punitive damage award, stating that plaintiffs seeking such damages carry a "heavy burden" and that the court "will not hesitate to reverse the trial judge's decision [to submit the question of punitive damages to the jury] where the facts of a particular case do not warrant instructing the jury as to the availability of punitive damages."[152] The court reversed the punitive damage award, finding the conduct of the defendant in this case to be:

---

[146] *Id.* at 985.

[147] *Id.*

[148] *See supra* notes 99-134 and accompanying text.

[149] The Fifth Circuit rejected a similar argument based on refusal to pay in a non-insurance policy context in United States v. Arundel Corp., 814 F.2d 193 (5th Cir. 1987), correctly noting that this case was a "not unusual breach of contract case with none of the public policy overtones that typically sound from Mississippi punitive damages cases." *Arundel*, 814 F.2d at 199; *see supra* note 102.

[150] 509 So. 2d 886 (Miss. 1987).

[151] *Epps*, 509 So. 2d at 888.

> more the product of oversight, inadvertence, or incompetence rather than the product of gross, callous or wanton conduct manifesting a reckless indifference to the consequences of their act or the rights of their subscribers. . . .
>
> . . . .
>
> . . . [The defendant's conduct] falls short of being rude, insulting or oppressive as is required in order to justify the imposition of punitive damages.[153]

In *Illinois Central Railroad v. White*,[154] the plaintiff secured a jury verdict including a $4 million punitive award.[155] The trial court granted judgment notwithstanding the verdict as to the punitive damage award and the supreme court affirmed, stating "[t]he railroad was negligent, at best, but certainly nothing more."[156]

An effort to expand the liability of insurance carriers in the punitive damage area was thwarted in *Davenport v. St. Paul Fire & Marine Insurance Co.*.[157] The plaintiff/anesthetist secured a judgment for more than $20 million in damages, including $15 million in punitive damages and $5 million for emotional distress, based on the alleged failure of the insurer to defend the plaintiff in an appropriate manner and later to provide the plaintiff with a new policy of malpractice insurance.[158] The hospital's malpractice insurance provider, treating the anesthetist as a hospital employee, afforded a successful defense.[159] In short, the court held that the insurer was entitled to control the defense of the malpractice litigation pursuant to the terms of the policy and it did not have any subsequent obligation to provide personal insurance to the plaintiff.[160] Accordingly, the court reversed the jury verdict and instructed the district court to dismiss the suit.[161]

---

[152] *Id.* at 893 (citing *Fedders*, 493 So. 2d at 311).

[153] *Id.* at 893-94.

[154] 610 So. 2d 308 (Miss. 1992).

[155] *White*, 610 So. 2d at 309.

[156] *Id.* at 320.

[157] 978 F.2d 927 (5th Cir. 1992).

[158] *Davenport*, 978 F.2d at 930.

III. THE ADVENT OF PUNITIVE DAMAGES IN THE CHANCERY COURTS

An interesting trend in the punitive damage cases reaching the supreme court is the large number which arise from the chancery courts. Prior to 1983 the supreme court had rejected the chancery court's authority to award punitive damages, stating in cases such as *Wilborn v. Balfour*,[162] that a "court of equity is a court of conscience, but not a forum of vengeance. It will make restitution, but not reprisals. It will fill full the measure of compensation, but will not overflow it with vindictive damages."[163] However, In *Tideway Oil Programs, Inc. v. Serio*,[164] the supreme court held that chancery courts have the power to assess punitive damages.[165] As the *Tideway* court observed, it does appear certain that chancery courts in Mississippi awarded punitive damages prior to *Wilborn*.[166] For instance, in *Hines v. Imperial Naval Stores Co.*,[167] the court noted that "the imposition of [punitive damages] lies as completely in the discretion of the chancellor as it does in the jury in cases tried by a jury."[168] In any event, the *Tideway* court reversed *Wilborn* and its progeny, observing:

---

[159] *Id.* at 929.

[160] *Id.* at 933-34.

[161] *Id.* at 934.

[162] 67 So. 2d 857 (Miss. 1953).

[163] *Wilborn*, 67 So. 2d at 863 (quoting Bush v. Gaffrey, 84 S.W.2d 759, 764 (Tex. Civ. App. 1935)).

[164] 431 So. 2d 454 (Miss. 1983).

[165] *Tideway*, 431 So. 2d at 459. In so holding, the court stated:

> We recognize that thirty years of clear decisions of this Court hold in the negative. On reexamination, we are convinced that neither history nor reason support such an approach. Accordingly, we now hold that the chancery courts of this state have the discretionary power to assess punitive damages according to the same substantive standards as apply in our circuit courts.

Id.

[166] *Tideway*, 431 So. 2d at 462-63.

[167] 58 So. 650 (Miss. 1912).

> Nothing in our law authorizes or allows punitive damages to the vengeful. There is no right to recover punitive damages. The award of such damages has always been discretionary. Awarding such damages to a plaintiff motivated by vindictiveness, a spirit of reprisal or greed would be an outrage. Neither courts of law nor courts of equity should give quarter to such unclean plaintiffs.[169]

Recent cases reaching the supreme court indicate that chancellors have not been timid in assessing punitive damage. In *Finkelberg v. Luckett*,[170] a chancellor awarded the plaintiff nearly $1.7 million, including $1.5 million punitive damages.[171] The supreme court reversed the bulk of the actual damage and the entire punitive damage award, affirming only actual damages of $13,571.[172] The court found the defendant merely negligent, and not guilty of fraud or deceit as alleged by the plaintiff.[173] In *Snow Lake Shores Property Owners Corp. v. Smith*,[174] the chancellor awarded $5900 as actual and $5900 as punitive damage to the plaintiff.[175] The court reversed and rendered, finding the punitive award erroneous in two particulars. First, the award was not supported by the existence of actual damages. Second, the court found that the chancery court made an "arbitrary choice of a sum to award as punitive damages in the face of its own acknowledgement that there was 'no proof upon which to predicate the assessment of exemplary damages.'"[176]

---

[168] *Hines*, 58 So. at 651.

[169] *Tideway*, 431 So. 2d at 461.

[170] 608 So. 2d 1214 (Miss. 1992).

[171] *Finkelberg*, 608 So. 2d at 1218.

[172] *Id.* at 1221.

[173] *Id.*

[174] 610 So. 2d 357 (Miss. 1992).

[175] *Snow Lake Shores*, 610 So. 2d at 358.

[176] *Id.* at 362.

A chancellor's award of punitive damages in the amount of $50,000 was affirmed in *Polk v. Sexton*,[177] where the defendant's breach of contract was found to be "gross and willful."[178]

Two of the most recent chancery court punitive damage awards considered by the supreme court demonstrate not only a lack of hesitation in awarding punitive damages, but also a boldness in innovating ways to deal with them. Thus, in *FSC Securities Corp. v. McCormack*,[179] the chancellor awarded the plaintiff $184,333 in actual damage and assessed punitive damages in the amount of $500,000.[180] However, relying on Rule 71 of the Mississippi Rules of Civil Procedure,[181] the chancellor, on his own motion, ordered that the State of Mississippi be added as a party to the case and that half of the punitive award be paid to the State.[182] In reversing the entire punitive damage award, the court noted that there was no statutory or common-law authority for the chancellor's action in awarding punitive damages to the State of Mississippi.[183] In so holding, the court stated that "if the State is to be a beneficiary of punitive damages awarded in a private civil action regarding securities, authority to make it so must come from the Legislature" and therefore "the Chancellor erred in sua sponte making the State a party for the purpose of receiving part of the award."[184]

In *Valley Forge Insurance Co. v. Strickland*,[185] the chancellor awarded $25,000 in actual damages and $1 million in punitive damages, with an additional $1 million in punitive damages contingent upon whether the defendant obtained certain court approval in Louisiana of a settlement involved in the litigation.[186] The court affirmed the $25,000 actual and $1 million unconditional punitive damage awards and reversed the conditional $1 million punitive damage award, stating that although the chancellor's "intentions were laudable, matters of such general and far-reaching import are better left to the legislative branch. Courts have only the more narrow duty to interpret the law. Furthermore, we do not consider the conduct related to the settlement in Louisiana sufficiently culpable to justify punitive damages."[187]

---

[177] 613 So. 2d 841 (Miss. 1993).

[178] *Polk*, 613 So. 2d at 843, 845.

[179] 630 So. 2d 979 (Miss. 1994).

[180] *McCormack*, 630 So. 2d at 987.

[181] MISS. R. CIV. P. 71 (1993).

[182] *McCormack*, 630 So. 2d at 987.

[183] *Id.*

[184] *Id.*

[185] 620 So. 2d 535 (Miss.), *cert. denied*, 114 S. Ct. 635 (1993).

IV. CHALLENGES TO THE CONSTITUTIONALITY OF PUNITIVE DAMAGES

A. *The United States Supreme Court*

Since 1988 the Supreme Court of the United States has considered five cases involving constitutional challenges to punitive damage awards, including *Bankers Life & Casualty Co. v. Crenshaw*,[188] on certiorari from the Mississippi Supreme Court.[189] The *Crenshaw* Court refused to consider arguments that the punitive damage award there violated the Due Process, Contract or Excessive Fines Clauses of the United States Constitution because the claims were neither raised nor passed upon by the state court.[190] Justices O'Connor and Scalia, in a concurring opinion, described the Mississippi punitive damage system as "standardless."[191]

---

[186] *Strickland*, 620 So. 2d at 540.

[187] *Id.* at 541.

[188] 486 U.S. 71 (1988).

[189] *See supra* notes 104-10 and accompanying text.

[190] *Crenshaw*, 486 U.S. at 76.

[191] *Id.* at 88 (O'Connor, J., concurring). Specifically, Justice O'Connor stated:

> Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause.
>
> . . . .
>
> Although [the Mississippi] standard may describe the required mental state with sufficient precision, the amount of the penalty that may ensue is left completely indeterminate. . . . This grant of wholly standardless discretion to

In *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*,[192] on certiorari from the United States Court of Appeals for the Second Circuit, the Supreme Court affirmed a $51,146 actual and $6 million punitive damage award in a proceeding governed by Vermont law.[193] The Court held that the Eighth Amendment's Excessive Fines Clause did not apply to punitive damage awards in cases between private parties in which the government neither prosecuted the action nor possessed any right to receive a share of the damages award.[194] The Court declined to consider the punitive damages award under the Due Process Clause since the issue had not been raised before the district court or court of appeals.[195]

In *Pacific Mutual Life Insurance Co. v. Haslip*,[196] on

---

determine the severity of punishment appears inconsistent with due process. *Id.* at 87-88 (O'Connor, J., concurring).

[192] 492 U.S. 257 (1989).

[193] *Browning-Ferris*, 492 U.S. at 262, 264.

[194] *Id.* at 275-76.

[195] *Id.* at 277. Justices Brennan and Marshall concurred, but noted:

> Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision. Indeed, the jury in this case was sent to the jury room with nothing more than the following terse instruction: "In determining the amount of punitive damages, . . . you may take into account the character of the defendants, their financial standing, and the nature of their acts." Guidance like this is scarcely better than no guidance at all. I do not suggest that the instruction itself was in error; indeed, it appears to have been a correct statement of Vermont law. The point is, rather, that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best. Because "[t]he touchstone of due process is protection of the individual against arbitrary action of government," I for one would look longer and harder at an award of punitive damages based on such skeletal guidance than I would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed.

Id. at 281 (Brennan, J., concurring) (citation omitted). Justice O'Connor, joined by Justice Stevens, concurring in part and dissenting in part, reiterated her *Crenshaw* comments "regarding the vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages." *Id.* at 283 (O'Connor, J., concurring in part, dissenting in part).

[196] 499 U.S. 1 (1991); *see* Douglas T. Miracle, Note, *Punitive Damages, Jury Discretion and the "Outer Limits" of the Fourteenth Amendment in Civil Cases*, 13 MISS.

certiorari from the Supreme Court of Alabama, the Court held that the common law method for assessing punitive damages was not per se unconstitutional as a violation of the Due Process Clause, affirming a punitive damage award of approximately $1 million.[197] The verdict was a general verdict, which for purposes of its consideration, the Supreme Court interpreted to include a punitive damage component of not less than $840,000.[198] The Court expressed concern, however, that unlimited jury or judicial discretion in the fixing of punitive damages could constitute a due process violation in a particular case, stating that "we cannot . . . draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus."[199]

The Court concluded that jury instructions consistent with Alabama law which advised that the purpose of punitive damage was not to compensate the plaintiff for injury but to punish the defendant and protect the public by deterring others from similar wrongdoing[200] were sufficient to describe the purpose of punitive damages, i.e., their discretion was confined to deterrence and retribution considerations.[201] Furthermore, the Court noted that the trial court properly excluded the financial wealth of the defendant from the trial in accordance with Alabama law[202] and that the Alabama Supreme Court had established post-trial procedures for scrutinizing punitive awards.[203] Additionally, the Alabama Supreme Court provides an additional check on the trial court's discretion by undertak-

---

C. L. REV. 221, 221 (1992) (discussing impact of *Haslip* on punitive damage awards).

[197] *Haslip*, 499 U.S. at 17.

[198] *Id.* at 7 n.2.

[199] *Id.* at 18.

[200] *Id.* at 19.

[201] *Id.*

[202] *Haslip*, 499 U.S. at 22. "Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Id.*

[203] *Id.* at 20.

ing a comparative analysis of the awards and by applying "detailed substantive standards it has developed for evaluating punitive awards."[204] In so holding, the *Haslip* court stated:

> This, we feel, distinguishes Alabama's system from the Vermont and Mississippi schemes about which Justices expressed concern [in *Browning-Ferris* and *Crenshaw*]. In those respective schemes, an amount awarded would be set aside or modified only if it was "manifestly and grossly excessive," or would be considered excessive when "it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience."[205]

In *TXO Production Corp. v. Alliance Resources Corp.*,[206] the United States Supreme Court affirmed a $10 million punitive damage award, including an award of $19,000 in actual damages for common law slander of title.[207] The Court again rejected, as in *Haslip*, any specific rule to govern constitutional reasonableness of punitive awards.[208] The Court based its affirmance on the "bad faith" of the defendant, its "scheme employed in this case [which] was part of a larger pattern of fraud, trickery and deceit," and consideration of the harm likely to result from the scheme ($5 to $8.3 million).[209] The Court refused to consider constitutional arguments on the adequacy of the instructions to the jury because they had not been properly presented to the lower courts.[210] The *TXO* opinion split the Court dramatically, with a three-member majority, three concurrences in the result and three dissents. This decision, unlike *Haslip*'s consideration of Alabama law, offers little guidance as to the fairness of the underlying procedural safeguards of the West Virginia punitive damage rules. The majority noted, "Assuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity."[211] Justice Scalia predicated his concurrence partly upon the premise that the Court "makes explicit what was implicit in *Haslip*: [T]he existence of a so-called 'substantive due process' right that punitive damages be reasonable."[212]

---

[204] *Id.* at 20-21.

[205] *Id.* at 22 n.10 (citations omitted).

[206] 113 S. Ct. 2711 (1993).

[207] *TXO*, 113 S. Ct. at 2718.

[208] *Id.* at 2722.

[209] *Id.* (stating that Alliance's share of projected development rights ranged from $5 to $8.3 million).

[210] *Id.* at 2723.

Most recently, in *Honda Motor Co. v. Oberg*,[213] the Court held an Oregon rule which limited judicial review of the size of a punitive damage award to be an unconstitutional violation of procedural due process.

B. The Court of Appeals for the Fifth Circuit

In the wake of *Haslip*, the United States Supreme Court remanded the case of *Eichenseer v. Reserve Life Ins. Co.*[214] to the Fifth Circuit for consideration in light of the *Haslip* opinion.[215] In a bench trial in the United States District Court for the Northern District of Mississippi, Judge Senter had entered a judgment for the plaintiff in the amount of $1000 actual and $500,000 punitive damages.[216] On appeal, the Fifth Circuit rejected constitutional arguments against punitive damages under the Eighth and Fourteenth Amendments.[217] On rehearing, four Judges dissented, including Mississippi's Judge Jolly, criticizing Mississippi's punitive damage law for its "vagueness" and "arbitrariness."[218]

---

[211] *Id.* at 2720.

[212] *TXO*, 113 S. Ct. at 2726 (Scalia, J., concurring).

[213] 62 U.S.L.W. 4627 (U.S. June 24, 1994).

[214] 499 U.S. 914, *remanded*, 934 F.2d 1377 (5th Cir. 1991).

[215] *Eichenseer*, 499 U.S. at 914.

[216] Eichenseer v. Reserve Life Ins. Co., 682 F. Supp. 1355, 1378 (N.D. Miss. 1988), *aff'd*, 881 F.2d 1355 (5th Cir. 1989), *reh'g denied*, 894 F.2d 1414 (5th cir. 1990), *cert. granted*, 499 U.S. 914 (1991).

[217] Eichenseer v. Reserve Life Ins. Co., 881 F.2d 1355, 1363 (5th Cir. 1989), *reh'g denied*, 894 F.2d 1414 (5th Cir. 1990) (en banc), *vacated* 499 U.S. 914 (1991).

[218] *Eichenseer*, 894 F.2d at 1418-21 (Jones, J., dissenting). The dissent noted:

> [D]espite the panel's incantation of Mississippi's "well established standards," the fact finder possesses unbridled discretion to punish, and punishment is meted out among defendants in radically varying amounts.
>
> . . . .

On remand, the Fifth Circuit again affirmed, applying the Supreme Court principles enunciated in *Haslip* and stating:

> In essence, the Court in *Haslip* reasoned that the constitutionality of an award of punitive damages is a function of two practical considerations: (1) whether the circumstances of the case indicate that the award is reasonable, and (2) whether the procedure used in assessing and reviewing the award imposes a sufficiently definite and meaningful constraint on the discretion of the fact-finder.[219]

In making such an assessment, the Fifth Circuit observed that its role was to provide "a fact intensive analysis," requiring careful consideration of the nature of the wrong, the status of the parties, the size of the punitive damage award and the relationship between the award and the amount of compensatory damages.[220] "[T]he amount of the award in the abstract" is not dispositive.[221] In applying these factors to the instant case, the court found support for the award in the record: the defendant's conduct was "particularly egregious,"[222] the "corporate size" of the defendant (net worth of $157 million) indicated that the award was reasonable,[223] and a previous award against this defendant for punitive damages in the amount of $150,000 was relevant.[224] The court rejected the argument that the relationship between compensatory and punitive damages (ratio of 500 to 1) was disproportionate since *Haslip*

> . . . [V]agueness inheres both in Mississippi's standards for inflicting liability and for measuring the amount of the punitive award. . . .
>
> . . . .
>
> . . . [T]he rubrics of punishment, deterrence and the other criteria set forth in Mississippi, while descriptive, are simply too uncertain to yield consistent results.
>
> The arbitrariness of the awards issued by juries is not, in Mississippi's system, subject to meaningful judicial review.

Id. at 1420-21 (Jones, J., dissenting).

[219] *Eichenseer*, 934 F.2d at 1381.

[220] *Id.* at 1382.

[221] *Id.*

[222] *Id.*

[223] *Id.* at 1383 (finding that defendant's net worth was $157 million).

[224] *Eichenseer*, 934 F.2d at 1384 (citing Reserve Life Ins. Co. v. McGee, 444 So. 2d 803 (Miss. 1983)).

specified no "mathematical bright line" test of constitutionality.[225] Finally, the court rejected the argument that the Mississippi procedure was inadequate, stating:

> Without question, [the Mississippi] criteria leave the trial court significant discretion in its determination of punitive damages. But this discretion is not unlimited. It is confined to the policies of deterrence and retribution. . . .
>
> . . . .
>
> The judge in this case was familiar with the complicated legal concepts that pervade the Mississippi law governing punitive damages, and he applied these concepts with due care.[226]

The court observed that effective procedural safeguards would include comprehensive jury instructions explaining the nature of punitive damages, state laws limiting the amount or applicability of punitive damages and rigorous systems of appellate review.[227] "It is far more appropriate for the Mississippi Legislature to set forth exact proportionality guidelines for punitive damages in Mississippi," than for the court to do so.[228]

C. *The Mississippi Supreme Court*

In light of *Haslip*, the Mississippi Supreme Court considered, in *Ivy v. General Motors Acceptance Corp.*,[229] the constitutionality of the state's punitive damage system.[230] In the lower court, the jury had returned a $5000 actual damage and a $100,000 punitive damage award for "maliciousness" by a creditor in repossessing a debtor's 1986 Chevy van.[231] The trial judge granted the defendant's motion for a judgment notwithstanding the verdict as to the punitive award.[232] Although the supreme court affirmed on all issues, Justice Prather, writing for the court, nonetheless addressed the constitutionality of Mississippi's punitive damage system.[233] Observing that the *Haslip* Court "seems to believe that a judge or jury's discretion is not limited or confined under Mississippi law; that the nature and purpose of a punitive-damages award is not defined; and that a substantive and comparative 'check' is not conducted by the Mississippi Supreme Court," she stated:

---

[225] *Eichenseer*, 934 F.2d at 1384.

[226] *Id.* at 1385-86. The court also noted:

> Certainly, the standard of appellate review in Mississippi is more forgiving than the Alabama standard that the Supreme Court approved in *Haslip*. Unlike the Alabama appellate courts, which apply a series of substantive standards to determine whether an award of punitive damages is excessive, an appellate court in Mississippi will set aside a punitive damages award only if "it evinces passion, bias and prejudice on the part of jury so as to shock the conscience." Nonetheless, in the instant case, we cannot conclude that the deferential nature of the standard of appellate review in Mississippi requires reversal.

Id. at 1386 (citations omitted).

[227] *Id.* at 1384-85.

[228] *Id.* at 1384 n.12.

[229] 612 So. 2d 1108 (Miss. 1992).

> However, in *Andrew Jackson v. Williams*, this Court meticulously explained that a judge or jury's discretion *is* limited or confined. This Court defined the nature and purpose of a punitive-damages award. And this Court provided a substantive and comparative "check" on the amount which the jury awarded the plaintiff.
>
> In sum, this Court rejects GMAC's contention that Mississippi's system for awarding punitive damages is unconstitutional.[234]

V. A SYSTEM OUT OF SYNC

Whether one agrees with Justices O'Connor and Scalia[235] that the Mississippi punitive damage system as of 1992 was "wholly standardless" or with Justice Prather[236] that it was well "defined," "limited" and "checked," there is little doubt but that something was amiss in a system which allowed South

---

[230] *Ivy*, 612 So. 2d at 1115.

[231] *Id.* at 1109.

[232] *Id.* at 1110-11.

[233] *Id.* at 1115.

[234] *Id.* at 1116 (emphasis in original) (citation omitted).

[235] *See supra* note 191 and accompanying text.

[236] *See supra* notes 229-34 and accompanying text.

Central Bell[237] to get hit for $3 million in punitive damages for "inadvertence," the Illinois Central Railroad to have a jury assess $4 million in punitive damage for simple negligence,[238] and St. Paul Fire and Marine Insurance Company to experience a jury verdict of $15 million in a case ultimately found to state no underlying cause of action.[239] The fact is that many trial courts had begun to pay only lip service to pronouncements that punitive damages should be considered with "great caution,"[240] "only in extreme cases,"[241] where the plaintiff had carried a "heavy burden."[242] Furthermore, it is clear that the Mississippi Supreme Court has struggled repeatedly with punitive cases, particularly in addressing the propriety of the amount of the award.[243] The court says the jury has complete discretion as to the amount of the award,[244] but acknowledges its duty to review.[245] Yet it has no reliable rule to apply.[246] More than one opinion has suggested that legislative action on punitive damages might be warranted.[247]

---

[237] *See supra* notes 150-53 and accompanying text.

[238] *See supra* notes 154-56 and accompanying text.

[239] *See supra* notes 157-61 and accompanying text.

[240] New Orleans, J. & G. N. R.R. v. Statham, 42 Miss. 607, 626 (1869).

[241] Gardner v. Jones, 464 So. 2d 1144, 1148 (Miss. 1985) (quoting Tideway Oil Programs, Inc. v. Serio, 431 So. 2d 454, 460 (Miss. 1983)).

[242] Finkelberg v. Luckett, 608 So. 2d 1214, 1220 (Miss. 1992).

[243] *See* Alfred G. Nichols, Jr., Comment, *Punitive Damages in Mississippi — A Brief Survey*, 37 MISS. L.J. 131, 150 (1965). "It has been said that one of the most confusing areas in the law of punitive damages is found in the relationship which they must bear to actual damages. Certainly such a statement holds true for Mississippi." *Id.* (footnote omitted). The comment was authored by now United States Magistrate Judge Alfred G. Nichols, Jr.

[244] *See, e.g.*, Harvey-Latham Real Estate v. Underwriters at Lloyd's, 574 So. 2d 13, 16 (Miss. 1990) (concluding that "the amount of punitive damages is a matter solely within the authority and discretion of the jury"); Life Ins. Co. v. Allen, 518 So. 2d 1189, 1194 (Miss. 1987) (stating that court is "not authorized to disturb a jury verdict [of] punitive damage because it 'seems too high' or 'seems too low'"); Yazoo & M.V.R. v. Williams, 39 So. 489, 492 (Miss. 1905) (holding that "in a case of punitory damages . . . the jury are the sole judges and may inflict such damages as they 'see fit'").

[245] *See, e.g.*, Gulf, M. & O. R.R. v. Hawthorne, 82 So. 2d 454, 456 (Miss. 1955) (stating that "while the fixing of the amount of such damages is largely in the discretion of the jury, we do not think that our cases so holding have ever been intended to turn the jury loose without a bridle"); Teche Lines, Inc. v. Pope, 166 So. 539, 540-41 (Miss. 1936) (recognizing that "courts are . . . required to exercise a supervisory power over [punitive] verdicts").

[246] *See* C & C Trucking Co. v. Smith, 612 So. 2d 1092, 1107 (Miss. 1992). In *C & C Trucking*, the court acknowledged the lack of a reliable rule to apply, stating:

VI. THE LEGISLATURE STEPS IN

In a curious reversal of roles as far as taking the initiative, the 1993 Mississippi Legislature adopted House Bill 1270,[248] including significant reform to the Mississippi punitive damages system.[249] Codified at section 11-1-65 of the Mississippi

---

> No formulation of precise rules of law have been made to determine whether an award of punitive damages is excessive. No fixed legal ratio between actual and punitive damage exists. No bright line of demarcation tells us when exemplary damages are excessive. It would be difficult, if not impossible, to state a rule with absolute precision.

C & C Trucking, 612 So. 2d at 1107; *see also* Andrew Jackson Life Ins. Co. v. Williams, 566 So. 2d 1172, 1191 (Miss. 1990) (concluding that "no 'yardstick' could possibly be created to measure such awards since totality of circumstances attendant a case varies on an *ad hoc* basis"); *Harvey-Latham*, 574 So. 2d at 16 (stating that "it is unclear what formula is used to reach the amount"); Employers Mut. Casualty Co. v. Tompkins, 490 So. 2d 897, 907 (Miss. 1986) (recognizing that "in appraising punitive damages [the courts] have sometimes expressed [their] reasoning through the use of mathematical formulas. . . . [These formulas] do not, and probably cannot, express an exact rule for the determination."); *Williams*, 39 So. at 491-92 (finding that "no inflexible guide by which the jury can be conducted to their determination of the amount" of punitive damage exists).

[247] *See, e.g.*, *Harvey-Latham*, 574 So. 2d at 17 (emphasizing need for punitive damage award standards, court noted it can only address issues "one [case] at a time. . . . We do not write statutes."); *Tompkins*, 490 So. 2d at 910 (Hawkins, J., dissenting) (stating that "[p]unitive damages imposed without restraint will not survive, in my view, but rather themselves be eliminated by Legislative action before corrective measures are taken to regulate the insurance companies"); *see also* Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377, 1384 n.12 (5th Cir. 1991) (concluding that it "is far more appropriate for the Mississippi Legislature to set forth exact proportionality guidelines for punitive damages in Mississippi" than for court to do so).

[248] 1993 Miss. Laws 302 (codified at MISS. CODE ANN. § 11-1-65 (Supp. 1993)).

[249] A classic example of judicial action and legislative inaction is the doctrine of sovereign immunity, which was abrogated by the Mississippi Supreme Court in Pruett v. City of Rosedale, 421 So. 2d 1046, 1052 (Miss. 1982), *overruled by* Webb v. County of Lincoln, 536 So. 2d 1356, 1359 (Miss. 1988), as applicable to causes of action occurring after July 1, 1984. *Pruett*, 421 So. 2d at 1052. Beginning in 1984, the Legislature annually prolonged the viability of the doctrine by legislative enactment until the court again acted to prohibit further such extensions. Presley v. Mississippi State Highway Comm'n, 608 So. 2d 1288, 1298-301 (Miss. 1992). Hence, the implementation of the tort claims procedure and related actions by the 1993 Legislature, including waiver of immunity to the extent therein set forth commencing

Code,[250] House Bill 1270 clearly constitutes a substantial departure in the Mississippi law of punitive damages. However, while some of its provisions are new to Mississippi law, others are principles with substantial grounding in the Mississippi common law.

A. *House Bill 1270 Adds Some New Rules*

1. *Clear and Convincing Evidence*

Section 11-1-65(1)(a) of the Mississippi Code requires that punitive damages be proved by clear and convincing evidence.[251] The burden heretofore has been preponderance of the evidence, the typical burden for civil litigation. Punitive damages are quasi-criminal penalties.[252] Mississippi law requires this heightened burden of proof—by clear and convincing evidence—in a multitude of otherwise civil proceedings which have quasi-criminal results or require proof of acts of opprobrium. Thus, fraud must be proved by clear and convincing evidence,[253] as must the defense of arson in defending a fire policy claim[254] and civil contempt.[255] Clear and convincing evidence is required to impose a civil sanction on a public official for violation of conflict-of-interest statutes,[256] as well as to impose disciplinary sanctions on an attorney or a judge.[257] The clear and convincing burden falls somewhere between that of preponderance of the evidence and proof beyond a reasonable doubt as required in criminal cases. One Mississippi case noted:

July 1, 1993, as to the state and October 1, 1993, as to political subdivisions. MISS. CODE ANN. §§ 11-46-1 to -23 (Supp. 1993).

[250] MISS. CODE ANN. § 11-1-65 (Supp. 1993).

[251] MISS. CODE ANN. § 11-1-65(1)(a) (Supp. 1993).

[252] Tideway Oil Programs, Inc. v. Serio, 431 So. 2d 454, 467 (Miss. 1983) (Broom, J., dissenting).

[253] *See* Anderson v. Burt, 507 So. 2d 32, 37 (Miss. 1987).

[254] *See* McGory v. Allstate Ins. Co., 527 So. 2d 632, 636 (Miss. 1988).

[255] Masonite Corp. v. International Woodworkers, 206 So. 2d 171, 180 (Miss. 1967).

[256] MISS. CODE ANN. § 25-4-109 (Rev. 1991).

[257] *See* MISS. R. DISC. 8.6; MISS. R. J. PERF. COMM. 8(D).

> In our opinion, the overwhelming weight of the evidence in a case might be for a party charging fraud . . . and such evidence still falls short of being "clear and convincing." The two terms are not synonymous, and a party charging fraud, even if he attain the degree of overwhelming weight of the evidence, its character must be further measured by the test, — is it clear and convincing?[258]

2. *Bifurcated Proceeding*

Section 11-1-65(1)(b) of the Mississippi Code requires that punitive damage be considered in a bifurcated proceeding, providing that the "trier of fact shall first determine whether compensatory damages are to be awarded and in what amount, before addressing any issues related to punitive damages."[259] If a compensatory award is made, "the court shall promptly commence an evidentiary hearing before the same trier of fact to determine whether punitive damages may be considered."[260] Rule 42 of the Mississippi Rules of Civil Procedure already provides discretionary bifurcation of any claim or separate issue.[261] When the claim or separate issue is punitive damage, bifurcation is required. The procedure is consistent with earlier suggestions of the supreme court, and its statement that "the matter of the assessment of punitive damages is rationally separable from the rest of a civil action."[262]

---

[258] Aponaug Mfg. Co. v. Collins, 42 So. 2d 431, 434 (Miss. 1949).

[259] MISS. CODE ANN. § 11-1-65(1)(b) (Supp. 1993).

[260] *Id.* § 11-1-65(1)(c).

[261] MISS. R. CIV. P. 42 (1993).

[262] Royal Oil Co. v. Wells, 500 So. 2d 439, 450 (Miss. 1986). In State Farm Fire & Casualty Co. v. Simpson, 477 So. 2d 242 (Miss. 1985), the court reversed and rendered awards for punitive and compensatory damages and remanded for trial on contractual damages. *Simpson*, 477 So. 2d at 254. The court expressed concern that the commingling at trial of the issues of punitive damages and contractual policy damages was prejudicial to the defendant. The court noted that if a plaintiff were not entitled to a peremptory instruction on the underlying contractual claim, "it logically follows that a punitive damage instruction should be refused," since there would be some arguable reason for denial of the contractual claim. *Id.* Where both the underlying claim and punitive damages, however, must be submitted to the jury, the court suggested severance under Rule 42 of the Mississippi Rules of Civil Procedure or at least special verdict instructions. *Id.*

3. *Trial Court Review of Award Amount Before Judgment*

Section 11-1-65(1)(f)(i) of the Mississippi Code provides that "[b]efore entering judgment for an award of punitive damages the trial court shall ascertain that the award is reasonable in its amount and rationally related to the purpose to punish what occurred giving rise to the award and to deter its repetition by the defendant and others."[263] While present Mississippi procedure clearly provides for trial court review of a punitive damage award amount by way of post-trial motions, this provision appears to contemplate court review before entry of judgment and prior to the time for filing of post-trial motions. In practice, this may result in reversed ruling on the punitive judgment until after typical post-trial motions and briefing, since trial courts probably would prefer to have the benefit of counsel argument on this issue. The provision serves to emphasize the trial court's post-trial review duty. Section 11-1-65(1)(f)(ii) sets forth factors for the court to consider in determining whether an award is excessive.[264]

4. *Reasonable and Rational Relationship of Punitive Award to Purpose and Harm*

Section 11-1-65(1)(f)(i) of the Mississippi Code requires the trial court to ascertain if a punitive award is "reasonable in its amount and rationally related" to the stated purposes of punishment and deterrence.[265] Section 11-1-65(1)(f)(ii)(1) directs a reviewing court to consider "[w]hether there is a reasonable relationship between the punitive damage award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred."[266] Obviously the language fails to express a required ratio between actual and punitive damage awards, but it signals that a rule which does more than instruct the jury to return "such damages as they see fit" and a review rule more objective than "shock the judicial conscience"[267] are required.

---

[263] MISS. CODE ANN. § 11-1-65(1)(f)(i) (Supp. 1993).

[264] *Id.* § 11-1-65(1)(f)(ii); *see infra* notes 320-30 and accompanying text.

[265] MISS. CODE ANN. § 11-1-65(1)(f)(i) (Supp. 1993).

[266] *Id.* § 11-1-65(1)(f)(ii)(1).

B. House Bill 1270 Restates Some Old Rules

1. Punitive Conduct

Section 11-1-65(1)(a) of the Mississippi Code requires "actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others," or "actual fraud" to warrant punitive damage.[268] The descriptive language may be more precise than 140 years of previous court pronouncements,[269] but probably represents no substantive change.[270] However, many trial courts do appear to have become lax in submitting punitive damage claims for jury consideration.[271] Even in the intentional tort cases, the Mississippi Supreme Court has historically required more than just the commission of an intentional tort in order to submit the question of punitive damages. Thus, in *Bounds v. Watts*,[272] the court reversed a plaintiff verdict for actual and punitive damage against a Picayune police officer because of an instruction which allowed the jury to return punitive damages if it should find the officer used more force during an arrest than necessary.[273] The court said more was required;[274] that the officer must have been "actuated by a reckless indifference" to justify punitive damage.[275] In *Sovereign Camp, W.O.W. v. Boykin*,[276] the court stated that "grossly unjustifiable" fraud would justify punitive damage.[277] Reversing a punitive damage award for fraud, the court stated, in *Gardner v. Jones*,[278] that "[p]unitive damages do not follow as the day the night every finding that a defendant has been guilty of fraud. Though fraud is frequently an ingredient of an award of punitive damages, it is clear from our cases that more is required."[279]

---

[267] *See supra* notes 26-30, 103-05 and accompanying text.

[268] MISS. CODE ANN. § 11-1-65(1)(a) (Supp. 1993).

[269] *See, e.g.*, Bell v. Morrison, 27 Miss. 68, 85 (1854) (approving first reported Mississippi punitive damage reward).

[270] *See, e.g.*, Beta Beta Chapter v. May, 611 So. 2d 889, 895 (Miss. 1992) (concluding that "willfulness and wantonness connote knowingly and intentionally doing a thing or wrongful act. This means actual knowledge . . . .") (quoting Raney v. Jennings, 158 So. 2d 715, 718 (Miss. 1963)); Strickland v. Rossini, 589 So. 2d 1268, 1272-73 (Miss. 1991) (stating that "careless disregard" is insufficient to justify punitive treatment, rather there must be "willful or malicious wrong" or "gross, reckless disregard for the rights of others" (emphasis omitted)); Wirtz v. Switzer, 586 So. 2d 775, 783 (Miss. 1991) (finding that punitive conduct must evince "a ruthless disregard for the rights of others" (citing South Cent. Bell v. Epps, 509 So. 2d 886, 892-93 (Miss. 1987))); Andrew Jackson Life Ins. Co. v. Williams, 566 So. 2d 1172, 1188 (Miss. 1990) (concluding that "almost any term that describes misconduct coupled with a bad state of mind will describe the case for a punitive award" (quoting DAN B. DOBBS, DOBBS LAW OF REMEDIES § 3.9, at 205 (1976)); Fowler Butane Gas Co. v. Varner, 141 So. 2d 226, 233 (Miss. 1962) (describing sanctionable conduct as "injuries inflicted in the spirit of wanton disregard for the rights of others . . . evincing the ruthless disregard for the rights of others"); Belk v. Rosamond, 57 So. 2d 461, 468 (Miss. 1952) (stating that gross negligence is insufficient unless "willful" or "wanton" or "such as to indicate an utter disregard for the safety" of others); Planters Wholesale Grocery v. Kincade, 50 So. 2d 578, 584 (Miss. 1951) (defining gross negligence in context of punitive damages as "reckless indifference to consequences"); Chicago, St. L. & N.O. R.R. v. Scurr, 59 Miss. 456, 461 (1882) requiring "negligence so gross as to evince a reckless disregard of consequences" for punitive recovery); New Orleans, J. & G.N. R.R. v. Statham, 42 Miss. 607, 611 (1869) (requiring "malice, violence, fraud, or oppression" to warrant punitive recovery).

Just as criminal cases typically require proof of criminal intent, quasi-criminal punitive damage cases should require a showing of intent to injure or conduct tantamount to that. Section 11-1-65(1)(a) reaffirms the Mississippi common law to that effect. In commercial cases, it should be noted that gross negligence, without malice or fraud, will not warrant punitive damages unless the gross negligence relates to a "disregard for the *safety* of others."[280]

---

[271] *See supra* notes 234-46 and accompanying text.

[272] 131 So. 804 (Miss. 1931).

[273] *Bounds*, 131 So. at 805.

[274] *Id.*

[275] *Id.*

[276] 181 So. 741 (Miss. 1938), *overruled on other grounds*, Reed v. Gilfoy, 148 So. 2d 714 (Miss. 1963).

[277] *Boykin*, 181 So. at 742.

[278] 464 So. 2d 1144 (Miss. 1985).

[279] *Gardner*, 464 So. 2d at 1148.

[280] MISS. CODE ANN. § 11-1-65(1)(a) (Supp. 1993) (emphasis added).

2. *Requirement of Actual Damage*

Section 11-1-65(1)(c) of the Mississippi Code provides that "[i]f, but only if, an award of compensatory damages has been made against a party," then the court shall proceed to a bifurcated punitive hearing.[281] This rule—that punitive damage cannot be awarded in the absence of actual damage—was established as early as 1866.[282]

3. *Court's Determination to Submit Issue of Punitive Damages for Jury Consideration*

Section 11-1-65(1)(d) of the Mississippi Code requires that the court in a bifurcated punitive damage proceeding "shall determine whether the issue of punitive damages may be submitted to the trier of fact."[283] This provision states the traditional rule that a trial judge must determine whether there is a sufficient evidentiary predicate for jury consideration of any issue, or if a directed verdict is proper.

> A circuit court's decision whether to grant a punitive damages instruction follows a familiar pattern, no different than with any other requested instruction. The question is whether there is a sufficient evidentiary basis to warrant the instruction, i.e.,

---

[281] *Id.* § 11-1-65(1)(c).

[282] *See* Southern R.R. v. Kendrick, 40 Miss. 374, 393 (1866) (recognizing this rule). For more recent examples supporting this proposition, see Alcorn County v. U.S. Supplies, Inc., 731 F.2d 1160, 1170 (5th Cir. 1984) (concluding that since plaintiff recovered no actual damages, then punitive damages were not recoverable because "[t]here simply is no independent cause of action for punitive damages under Mississippi law"); Cook Indus., Inc. v. Carlson, 334 F. Supp. 809, 817 (N.D. Miss. 1971) (holding plaintiff entitled to nominal damages and refusing to award punitive damages since nominal damages are not actual or compensatory damages); Snow Lake Shores Property Owners Corp. v. Smith, 610 So. 2d 357, 362 (Miss. 1992) (reversing punitive award because actual damages did not support award of punitive damages); Mississippi Power Co. v. Jones, 369 So. 2d 1381, 1385-86 (Miss. 1979) (returning verdict of $0 actual and $15,000 punitive damages, whereupon trial court directed jury to deliberate further with instruction that it could not return punitive damages without actual damages). For exceptions to this rule, see *infra* note 339 and accompanying text.

[283] MISS. CODE ANN. § 11-1-65(1)(d) (Supp. 1993).

is the evidence sufficiently disputed that a jury issue has been made?[284]

4. *Purpose of Punitive Damages*

Section 11-1-65(1)(e) of the Mississippi Code requires that the jury "be instructed that the primary purpose of punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others."[285] This has been the Mississippi rule since the inception of punitive damages.[286]

C. *House Bill 1270 and Rules That May Have Been Forgotten*

1. *Factors for Jury Consideration in Punitive Award*

Section 11-1-65(1)(e) of the Mississippi Code describes factors for jury consideration in determining the amount of punitive damages, including:

(i) defendant's financial condition and net worth;
(ii) nature and reprehensibility of defendant's wrongdoing;
(iii) impact of defendant's conduct on plaintiff;
(iv) relationship of defendant to plaintiff;
(v) defendant's awareness of amount of harm being caused;

---

[284] Colonial Mortgage Co. v. Lee, 525 So. 2d 804, 807-08 (Miss. 1988).

[285] MISS. CODE ANN. § 11-1-65(1)(e) (Supp. 1993).

[286] *See, e.g.*, Tideway Oil Programs, Inc. v. Serio, 431 So. 2d 454, 467 (Miss. 1983) (Broom, J., dissenting) ("[A]warding of punitive damages is a means of punishing the wrongdoer as a sort of retribution calculated to discourage him from repeating the same transgression, and deter others from engaging in similar conduct."); Bell v. Morrison, 27 Miss. 68, 85 (1854) (approving punitive damages "as a punishment against the defendant . . . to operate by way of example, and to deter others"). Although the supreme court has prescribed reward to the plaintiff for public service in bringing wrongdoing to account as a factor for consideration in the award of punitive damage, the court has not described this as a purpose of punitive damage. "Punitive damage is never allowed for the purpose of enriching the injured party." Yazoo & M.V.R. v. Hardie, 55 So. 967, 970 (Miss. 1911); *see* Friendly Fin. Co. v. Mallett, 243 So. 2d 403, 407 (Miss. 1971) ("Exemplary damages are not awarded as a windfall for the plaintiff."). In Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991), the United States Supreme Court held jury instructions consistent with Alabama law describing the purpose of punitive damages to be deterrence and retribution, and not to compensate plaintiff, as sufficient to withstand a due process challenge. *Haslip*, 499 U.S. at 19.

(vi) defendant's motivation in causing harm;
(vii) duration of defendant's misconduct;
(viii) whether defendant attempted to conceal misconduct; and
(ix) *any other circumstances that bear on proper amount of punitive damages.*[287]

While some Mississippi decisions may appear to restrict consideration to the factors of deterrence, retribution, reward to plaintiff and financial worth, the Mississippi rule always appears to have been that any circumstance relevant to punitive conduct should be considered. In *Bell v. Morrison*,[288] the court stated that all circumstances "whether of aggravation or mitigation" should be considered.[289] In *Eltringham v. Earhart*,[290] the court allowed the jury "to consider the malice of the defendant, the insulting character of his conduct, the rank in life of the several parties, and all the circumstances of the outrage, and thereupon to award such exemplary damages as the circumstances may in their judgment require."[291] In *Geophysical Service, Inc. v. Thigpen*,[292] the court reversed a general verdict, including punitive damage, where the defendant was prevented at trial from introducing evidence of mitigating circumstances associated with his wrongful trespass on the plaintiff's property.[293] In *Snowden v. Osborne*,[294] the court reversed and remanded for retrial on the issue of punitive damage in an assault case.[295] The court discussed the respective ages and physical size of the plaintiff and the defendant, as well as whether the defendant had knowledge of the plaintiff's heart condition, as factors relevant to the appropriateness of the punitive damage award.[296] The court in *C & C Trucking Co.*

---

[287] MISS. CODE ANN. § 11-1-65(1)(e) (emphasis added) (numericals added).

[288] 27 Miss. 68 (1854).

[289] *Bell*, 27 Miss. at 86.

[290] 7 So. 346 (Miss. 1890).

[291] *Eltringham*, 7 So. at 346 (quoting 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 89, at 78 (1850)).

[292] 102 So. 2d 423 (Miss. 1958).

[293] *Thigpen*, 102 So. 2d at 424.

[294] 269 So. 2d 858 (Miss. 1972).

[295] *Snowden*, 269 So. 2d at 861.

[296] *Id.*

v. Smith[297] listed retribution, deterrence, financial worth and reward to the plaintiff as general factors to be considered, and also:[298] nature of wrong, character of defendant's conduct, degree of culpability of wrongdoer, situation and sensibility of parties, extent to which conduct offends public sense of justice and propriety and proportion of punitive award to compensatory award.[299] These jury considerations as to the quantum of punitive damages are "*inclusive* and *not exclusive*:" "the exigency of each case determines the parameters of appropriate factors for jury consideration."[300]

(a) The Mass Tort Case

The Fifth Circuit, in fact, has interpreted the Mississippi punitive damage law broadly enough to allow a mass tort defendant to introduce evidence to the jury that an excessive award might prevent other plaintiffs from recovery of compensatory damages. In *Jackson v. Johns-Manville Sales Corp.*,[301] the court rejected the defense argument that Mississippi law does not allow punitive damages in the context of mass tort litigation, noting:

> Mississippi law already provides that the defendants could have introduced to the jury evidence of their asserted dire financial straits, and of the possibility that punitive damage awards might prevent other plaintiffs from recovering even compensatory damages. They could have attempted to convince the finder of fact that they did not need to be deterred, or that the effect of punitive damage awards would cripple their companies. They could have produced evidence of their contingent liability and then requested that the trial judge specifically instruct the jury that this evidence be taken into account in assessing the amount of punitive damages, if any.[302]

---

[297] 612 So. 2d 1092 (Miss. 1992).

[298] *C & C Trucking*, 612 So. 2d at 1105, 1107.

[299] *Id.* at 1107 (citing Ford Motor Co. v. Durrill, 714 S.W.2d 329, 346 (Tex. Ct. App. 1986)).

[300] *C & C Trucking*, 612 So. 2d at 1107.

[301] 781 F.2d 394 (5th Cir.), *cert. denied*, 478 U.S. 1022 (1986).

[302] *Jackson*, 781 F.2d at 407 (citation omitted).

The mass tort case does present unique issues. If the primary purpose of punitive damage is to punish and deter wrongdoing, it would seem that once any plaintiff recovers such an award, other plaintiffs would be precluded from doing so on the basis of the same conduct.[303] The purpose of punishment and deterrence would have been served and the court has repeatedly noted that punitive damages are not awarded for the purpose of enriching the plaintiff.[304]

(b) Compliance With or Violation of Law

Another factor considered by the courts is whether particular conduct violated the law. In *Mississippi Power Co. v. Jones*,[305] the court stated that "an unlawful act within itself is not ground for an award of punitive damages."[306] The plaintiff there complained that the defendant failed to comply with a municipal ordinance, which the court obviously considered relevant but not dispositive on the issue of punitive damage.[307] Conversely, however, conduct alleged to warrant an award of punitive damage which does comply with law or regulation should not be grounds for punitive damages. Such conduct can hardly be categorized as motivated by actual malice or fraud. A recent American Law Institute study suggested that conduct in compliance with law or regulation should not give rise to *any* tort liability,[308] much less be considered the aggravated type of conduct required to support punitive damage.

---

[303] *See In re* School Asbestos Litigation, 789 F.2d 996, 1005 (3d Cir.) (arguing that as matter of substantive tort law or constitutional law courts are responsible for preventing punitive damage awards for same conduct), *cert. denied*, 479 U.S. 915 (1986).

[304] Successive punitive awards for the same conduct have been approved by some of the few courts which have addressed the issue. *See* Dunn v. Hovic, 1 F.3d 1371, 1385 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993). However, in *Dunn*, the court reduced the punitive award to $1 million because of the effect of successive punitive awards. *Dunn*, 1 F.3d at 1391.

[305] 369 So. 2d 1381 (Miss. 1979).

[306] *Jones*, 369 So. 2d at 1385.

[307] *Id.*

[308] AMERICAN LAW INSTITUTE, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 281 (Reporters' Study 1991).

(c) The Wealth Factor

Section 11-1-65(1)(e) of the Mississippi Code[309] requires that a punitive damage fact finder consider a defendant's financial condition and net worth. Until the supreme court decided *Whittington v. Whittington*[310] in 1988, which required that precise net worth (assets minus liabilities) be proved, Mississippi cases indicated a rule which allowed proof of financial condition *or* net worth to support punitive damage.[311] The court reversed the *Whittington* rule in 1992 in two cases, one in which the court did not require precise net worth proof to support punitive damages,[312] and another clarifying that no requirement existed that a defendant have a positive net worth in order to be liable for punitive damage.[313] It is possible that the House Bill 1270 provision,[314] "the fact finder *shall* consider defendant's financial condition *and* net worth," will be interpreted to require precise net worth proof.[315] However, the statutory language does not require a punitive damage defendant to have a positive net worth, and a defendant should be liable for punitive damage regardless of the absence of wealth.[316] Conversely, a defendant's wealth should not be determinative of the amount of a punitive award. The Mississippi law would be fairer if the court did not admit evidence of financial condition and net worth. The court has acknowledged that proof of wealth is prejudicial to a defendant, hence its exclusion from evidence in a case alleging punitive damage until the court has determined that the issue of punitive damage may be submitted to the jury.[317] The proof of wealth invites the very argument Justice Hawkins criticized in his

---

[309] MISS. CODE ANN. § 11-1-65(1)(e) (Supp. 1993).

[310] 535 So. 2d 573 (Miss. 1988).

[311] *Whittington*, 535 So. 2d at 584. While the supreme court may have employed language implying that a defendant's net worth had to be shown, the punitive damage cases consistently demonstrated that proof of a defendant's financial condition was sufficient. Thus, in Interstate Co. v. Garnett, 122 So. 373 (Miss. 1929), evidence of the defendant's paid up capital stock, surplus, assets, amount of preferred stock, dividend history, as well as the fact that the defendant operated hotels, lunchrooms and newsstands throughout the United States was held sufficient proof of financial worth to support a punitive damage award. *Garnett*, 122 So. at 382. In Yazoo & M.V.R. v. Smith, 196 So. 230 (Miss. 1940), the fact that the defendant operated several hundred miles of railroad was sufficient "without the necessity of proving, in further particularity, the actual financial worth of appellant." *Smith*, 196 So. at 231. In First Am. Nat'l Bank v. Mitchell, 359 So. 2d 1376 (Miss. 1978), *overruled by* C & C Trucking v. Smith, 612 So. 2d 1092 (Miss. 1992), the court reversed a punitive damages award, not for the failure to prove the net worth of the defendant, but for failure to make "some proper showing of the net worth *or* financial condition" of defendant. *Mitchell*, 359 So. 2d at 1381 (emphasis added). In short, the court has historically accepted many different methods of showing financial condition without requiring the precise test employed in *Whittington*. The court has even affirmed punitive damage awards in the absence of any proof of financial worth. *See, e.g.*, Henry v. Collins, 158 So. 2d 28, 39 (Miss. 1963) (answering plaintiff's failure to show financial worth by stating that "this Court cannot be blamed for lack of that information"), *rev'd*, 380 U.S. 356 (1965). In Sandifer Oil Co. v. Dew, 71 So. 2d 752 (Miss. 1954), the court affirmed on the basis that the defendant's posting of a supersedeas bond for appeal "with a surety company as the surety thereon" was proof enough. *Dew*, 71 So. 2d at 759.

[312] *See* Beta Beta Chapter v. May, 611 So. 2d 889, 895 (Miss. 1992) (considering evidence of fraternity's financial standing and noting that though "in a formal accounting sense" fraternity had negligible net worth, it still had ability to collect $18,800 per month from its members). The court noted the *Whittington* reversal of a punitive award where the "defendant's proof failed to adequately establish her net worth — assets minus liabilities — so as to serve as a measure for the Court to consider

---

in arriving at a sum to award as punishment in this case." *May*, 611 So. 2d at 896 (quoting *Whittington*, 535 So. 2d at 584). The court in *May* therefore overruled *Whittington* to the extent that it required precise proof of net worth to support an award of punitive damage, finding sufficient financial information about the defendant fraternity to have been submitted to the court to support a punitive award. *Id.*

[313] *See C & C Trucking*, 612 So. 2d at 1103. The *C & C Trucking* court faced a somewhat different problem with net worth proof because one of the defendants had a personal net worth of zero and a corporate defendant had dissolved. *Id.* Writing for the court, Justice Sullivan noted that "[l]iteral adherence to a requirement of proof of net worth prerequisite to an award of punitive damages results in a defendant with zero net worth being *ipso facto* excluded and absolved from payment of such damages. We fail to see the reason underlying such a rule." *Id.* Again, the court declared that *Whittington* was overruled to the extent that it required precise net worth proof to support an award of punitive damage. *Id.*

[314] 1993 Miss. Laws 302 (codified at MISS. CODE ANN. § 11-1-65 (Supp. 1993)).

[315] *Id.* (emphasis added).

[316] *But see* T.C.L., Inc. v. LaCoste, 431 So. 2d 918, 923 (Miss. 1983) (reversing jury verdict of $300,000 punitive damage with actual damage of $880 because punitive award "had the effect of destroying appellants' financial status rather than merely punishing them").

[317] *See* Jones v. Carter, 7 So. 2d 519, 521 (Miss. 1942). The *Jones* court stated that "[o]bviously, such testimony [of financial worth] was highly prejudicial to the defendant." *Jones*, 7 So. 2d at 521. The court reversed the lower court verdict as excessive on this ground, even though the appellant had not assigned the inadmissible evidence as error. *Id.*

dissent in *Crenshaw*[318] that "the bigger they are the more we ought to zap them."[319]

2. *Factors for Consideration in Post-Trial Review*

Section 11-1-65(1)(f)(ii) of the Mississippi Code[320] calls for the court to consider several factors in determining whether a punitive damage award is excessive:

> (i) reasonable relationship between award and harm likely to result from defendant's conduct;
> (ii) reasonable relationship between award and harm that actually occurred;
> (iii) degree of reprehensibility of defendant's conduct;
> (iv) duration of conduct;
> (v) defendant's awareness;
> (vi) any concealment;
> (vii) existence and frequency of similar past conduct;
> (viii) financial condition and net worth of defendant;
> (ix) imposition of criminal sanctions for conduct; and
> (x) existence of other civil awards for same conduct.[321]

There is obvious overlap between these factors and those for jury consideration discussed above. Clearly anything the jury should consider in making an award, the court should consider in review. The statute referenced the last two cited factors as "[i]n mitigation."[322] This qualifying language possibly intends that these factors be solely for the court's consideration, since evidentiary rules might preclude the introduction of evidence on these issues before the trier of fact.[323]

In any event, the Mississippi cases support the proposition that post-trial review of punitive awards should include consideration of any relevant factor. In *Snowden v. Osborne*,[324] the court's post-trial review led to reversal and remand of the punitive award because the record was silent as to the physical size and age of the litigants and whether defendant knew of the plaintiff's heart condition "which could be indicative of malice."[325] In *Employers Mutual Casualty Co. v. Tompkins*,[326] the court stated that review should "give due consideration to the degree and nature of transgression from reasonable and lawful practices and the likely harmful effect upon the individual litigant and the public."[327] In *Mutual Life Insurance Co. v. Wesson*[328] and *C & C Trucking Co. v. Smith*,[329] the court discussed and appears to have taken into consideration the various statutorily prescribed jury factors.[330]

---

[318] 483 So. 2d 254 (Miss. 1985) (Hawkins, J., dissenting).

[319] *Crenshaw*, 483 So. 2d at 280 (Hawkins, J., dissenting).

[320] MISS. CODE ANN. § 11-1-65(1)(f)(ii) (Supp. 1993).

[321] *Id.* (numericals added).

[322] MISS. CODE ANN. § 11-1-65(1)(f)(ii)(4) (Supp. 1993).

[323] *Dunn*, 1 F.3d at 1389. The court discussed the necessity of making a record on the amount of prior punitive awards in the context of a due process challenge. *Id.*

[324] 269 So. 2d 858 (Miss. 1972).

3. *Protection of Innocent Retailers and Wholesalers*

Section 11-1-65(1)(g) of the Mississippi Code[331] precludes an award of punitive damages against a product seller who did not participate in the manufacture or alteration of a product, did not know of its defective condition and made no express representation about the product.[332] Such a seller was insulated from even actual damage under the doctrine of *Shainberg Co. v. Barlow*.[333] The court undercut this doctrine as to actual damages in *Coca-Cola Bottling Co. v. Reeves*.[334] While not speaking to the question of actual damages, section 11-1-65(1)(g) precludes punitive damage against this type of innocent retailer or wholesaler. However, given the premise that a party may recover punitive damages only for willful, wanton, fraudulent or reckless disregard conduct, it is difficult to imagine a case in which an unknowing seller who did not participate in manufacture or alteration of a product or make an express representation could be guilty of punitive conduct.

---

[325] *Snowden*, 269 So. 2d at 861.

[326] 490 So. 2d 897 (Miss. 1986).

[327] *Tompkins*, 490 So. 2d at 907.

[328] 517 So. 2d 521 (Miss. 1987).

[329] 612 So. 2d 1092 (Miss. 1992).

[330] *See supra* notes 286-99 and accompanying text.

[331] MISS. CODE ANN. § 11-1-65(1)(g) (Supp. 1993).

[332] *Id.*

[333] 258 So. 2d 242, 244-45 (Miss. 1972).

[334] 486 So. 2d 274, 274 (Miss. 1986).

D. Exclusions From House Bill 1270

Section 11-1-65(2) of the Mississippi Code[335] excludes contracts, libel and slander and actions involving asbestos from the provisions of House Bill 1270.[336] The effect of the language is at best problematic. The historic Mississippi rule is that a party may not recover punitive damages for breach of contract except "when the breach is attended by such gross negligence or willful wrong as to amount to a tort."[337] Did the Mississippi Legislature intend exclusion of only the underlying contract action, or does the language also reach the independent tort which supports the punitive damage claim? The asbestos language is certainly clearer, excluding "[c]auses of action . . . arising out of asbestos."[338] Libel and slander constitute a breed apart. When the offense is actionable per se, these cases constitute an exception to the rule that actual damage must be found to award punitive damage.[339] Furthermore, when the defendant is a public figure, the plaintiff must prove malice by clear and convincing evidence.[340] Libel and slander are governed by a separate set of rules designed for their unique purpose, including a heightened burden of proof when the purpose is to punish a bad state of mind. Even to the extent that the courts interpret section 11-1-65[341] to exclude these classes of cases, the only significant impact should be burden of proof. Heightened burden of proof and mandatory bifurcation are clearly new features in section 11-1-65.[342] Bifurcation remains discretionary under Rule 42 of the Mississippi Rules of Civil Procedure[343] even in excluded cases. While a rational and reasonable relationship between punitive damage and actual damage is new in section 11-1-65, the due process problems inherent in the absence of such a provision would seem to dictate that the courts incorporate such a feature in all punitive cases, regardless of whether they are specifically covered by section 11-1-65.

---

[335] MISS. CODE ANN. § 11-1-65(2) (Supp. 1993).

[336] MISS. CODE ANN. § 11-1-65(2) (Supp. 1993).

[337] D.L. Fair Lumber Co. v. Weems, 16 So. 2d 770, 773 (Miss. 1944).

[338] MISS. CODE ANN. § 11-1-65(2)(c) (Supp. 1993).

[339] *See* Newsome v. Henry, 443 So. 2d 817, 819 (Miss. 1983); Interstate Co. v. Garnett, 122 So. 373, 382 (Miss. 1929). In *Garnett*, the court held that an eighteen-year-old girl was entitled to recover $15,000 for having been called a "bitch" by defendant's employee. *Garnett*, 122 So. at 382. Webster and other dictionaries indicated that "bitch" imputes unchastity and therefore was actionable per se under Mississippi law. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 222 (3d ed. 1971). However, calling the plaintiff a "son of a bitch" netted only $500. Milner Hotels, Inc. v. Dougherty, 15 So. 2d 358 (Miss. 1943). Another common-law exception is criminal conversation, i.e., adultery with another's spouse. Walter v. Wilson, 228 So. 2d 597, 598 (Miss. 1969), *overruled by* Saunders v. Alford, 607 So. 2d 1214 (Miss. 1992). Such cases presume malice. The criminal conversation action was abolished in Saunders v. Alford, 607 So. 2d 1214 (Miss. 1992). The court noted that the action was largely subsumed by that of alienation of affection.

[340] *See Newsome*, 443 So. 2d at 817. The case affirmed $2500 in punitive damage, with no actual damage, for libel and slander, in favor of Aaron Henry, a Mississippi legislator and 33-year President of the Mississippi NAACP. *Id.* at 817. In another case, the court affirmed a $15,000 judgment for libel against Henry. Henry v. Collins, 158 So. 2d 28, 39 (Miss. 1963), *rev'd*, 380 U.S. 356 (1965). The supreme court approved the

E. Common Law Principles That Survive House Bill 1270

Section 11-1-65 of the Mississippi Code[344] does not supplant the common law. There are many examples of principles unaddressed by the legislation which will continue to apply. Some examples are: While a principal or employer may be liable for the act of his agent or employee,[345] the liability must be predicated on the conduct giving rise to the underlying cause of action.[346] Punitive damages are not joint and several as to

---

verdict, including punitive damage, despite the lack of proof of the defendant's financial worth in the record, stating "[we] cannot be blamed for the lack of that information." *Henry*, 158 So. 2d at 39.

[341] MISS. CODE ANN. § 11-1-65 (Supp. 1993).

[342] *See supra* notes 251-62 and accompanying text.

[343] MISS. R. CIV. P. 42 (1993).

[344] MISS. CODE ANN. § 11-1-65 (Supp. 1993).

[345] *See supra* note 39 and accompanying text. *But see supra* note 48 and accompanying text.

[346] In Hood v. Dealers Transport Co., 459 F. Supp. 684 (N.D. Miss. 1978), the plaintiff sought to recover punitive damages from an employer based on a theory of negligent entrustment of the truck involved in an accident which injured plaintiff. *Hood*, 459 F. Supp. at 686. Noting that the Mississippi Supreme Court had not ruled precisely on the point, the district court stated that it was "convinced that should the question be submitted to the Mississippi Supreme Court that Court would hold that the defendant would be liable for punitive damages only if its driver would be liable for

defendants charged with different punitive conduct.[347] Punitive damages may not be awarded against the estate of a deceased person,[348] but conviction of a defendant on account of the conduct alleged to justify punitive damage does not preclude a plaintiff from recovery,[349] nor does the death of the plaintiff.[350] However, a public body cannot be held liable for punitive damages for its employees' conduct,[351] nor is the surety on

---

such damages had the driver been made a party to the action." *Id.*

[347] Western Union Telegraph Co. v. McKinney, 67 So. 647, 647 (Miss. 1915) (holding one company not liable for punitive damages of another company where each company acted independently and neither was responsible for other's conduct). *But see* Thompson v. Johnson, 180 F.2d 431, 434 (5th Cir. 1950) (finding joint-tortfeasor's concerted action and common enterprise sufficient to establish joint liability for punitive damages where one tortfeasor battered plaintiff while other tortfeasors restrained her).

[348] *See, e.g.*, Hewellette v. George, 9 So. 885, 887 (Miss. 1891) (refusing punitive damages to plaintiff wrongfully incarcerated in insane asylum because defendant was deceased and "punishment [is not] visited upon the dead"), *overruled by* Glaskox v. Glaskox, 614 So. 2d 906 (Miss. 1992); Mervis v. Wolverton, 211 So. 2d 847, 848 (Miss. 1968) (reaching same result, but on basis of section 91-7-235 of Mississippi Code, which prohibited punitive damages against estate).

[349] Wagner v. Gibbs, 31 So. 434, 435 (Miss. 1902).

[350] *Wagner*, 31 So. at 435 (concluding that death of party assaulted did not preclude recovery of punitive damages for assault).

[351] *See, e.g.*, Hart v. Marshall County, 720 F.2d 1443, 1444 (5th Cir. 1983) (finding that punitive damage award against county for individual supervisor's tortious conduct was improper); Urban Renewal Agency v. Tackett, 255 So. 2d 904, 905 (Miss. 1971) (holding municipality not liable for punitive damages for conduct of its servants or agents "unless authorized by statute"); Town of Newton v. Wilson, 91 So. 419, 419 (Miss. 1922) (recognizing that "municipalities functioning solely in the public interest are not liable for punitive damages for the willful or malicious conduct of its servants"); Payne v. Bartlett, 89 So. 912, 912 (Miss. 1921) (finding Director General of Railroads as agent of United States government not liable for punitive damages for employee's willful, wanton and malicious conduct). The *Marshall County* case and its companion, Hart v. Walker, 720 F.2d 1436 (5th Cir. 1983), present the anomalous situation of a county supervisor sued for removing culverts placed there by a constituent and allegedly committing an assault and false arrest in the process. Most Mississippi supervisors experience difficulty in placing culverts on constituents' private property rather than the converse. The district court found the supervisor liable for $7500 in actual and $7500 in punitive damages. *Walker*, 720 F.2d at 1441-42. The Fifth Circuit affirmed, noting that the punitive award was appropriate based on the plaintiff's state law claim, as well as on the plaintiff's federal law claim for deprivation of constitutionally protected rights under 42 U.S.C. § 1983. *Id.* at 1442. The court found the county, however, to have immunity with respect to the punitive damage claim. *Marshall County*, 720 F.2d at 1444. In Lawrence v. Virginia Insurance Reciprocal, 979 F.2d 1053 (5th Cir. 1992), the court held that the immunity of a governmental body from punitive

a public official bond liable for punitive damages.[352] The Mississippi Insurance Guaranty Association has been held immune from punitive damage claims as a matter of law, since the Association is a legislatively created body intended to protect the public from insolvency of insurers.[353]

An employer or workmen's compensation carrier may recover benefits payable to an employee from his recovery of punitive damages against a third party.[354] While public policy does not preclude recovery of punitive damages under a liability insurance policy,[355] the extent of such coverage is governed by the terms of the agreement between the parties.[356] However, punitive damages are not included within the coverage of the

---

damage claims was not waived by purchasing liability insurance. *Lawrence*, 979 F.2d at 1057. In *Lawrence*, a community hospital had purchased liability insurance as authorized by section 41-13-11(2) of the Mississippi Code. MISS. CODE ANN. § 41-13-11(2) (Rev. 1993) (repealed by MISS. CODE ANN. § 41-13-11(3) (Rev. 1993) as of Oct. 1, 1993). Section 41-13-11 also provided for waiver of immunity to the extent of liability coverage on account of "negligence," and the court held that punitive damage did not fall within the category of that caused by negligence. *Lawrence*, 979 F.2d at 1057. In 1993, the Mississippi Legislature adopted a sovereign immunity procedure for all state and local governments which preserves immunity for punitive damages. *See* MISS. CODE ANN. §§ 11-46-1 to -23 (Supp. 1993).

[352] *See* Vanderslice v. Shoemake, 102 So. 2d 804, 805 (Miss. 1958); Cooper v. United States Fidelity & Guar. Co., 188 So. 6, 8 (Miss. 1939); Lizana v. State, 69 So. 292, 293 (Miss. 1915); *see also* United States Fidelity & Guar. Co. v. Stringfellow, 182 So. 2d 919, 923 (Miss. 1966) (returning general jury verdict for actual and punitive damage in amount of $50,000 for wrongful death where decedent was shot by deputy sheriff). In *Stringfellow*, the trial court remitted the amount to $25,000, the entirety of which the supreme court allowed to be recovered from the surety on the sheriff's official bond, stating that "[a]ssuming that appellant is correct in that punitive damages were added to the actual damages assessed by the jury, certainly it cannot be said that more than one-half of the damages assessed were punitive or 'added damages' in this case, where a young father was wrongfully killed." *Stringfellow*, 182 So. 2d at 923. The court, however, did agree that punitive damages could not be recovered against the official bond. *Id.* at 922.

[353] Kitchen v. Mississippi Ins. Guaranty Ass'n, 560 So. 2d 129 (Miss. 1990).

[354] Mississippi Power Co. v. Jones, 369 So. 2d 1381, 1387-88 (Miss. 1979).

[355] *See* Anthony v. Frith, 394 So. 2d 867, 868 (Miss. 1981). In *Frith*, the lower court held it to be against public policy to allow recovery of punitive damages under the liability insurance policy. *Frith*, 394 So. 2d at 868. The supreme court reversed, holding that it was not against public policy. *Id.* If the insurance contract language covered punitive conduct, then the court, as a matter of public policy, would not interfere. *Id.*

[356] *See* Old Sec. Casualty Ins. Co. v. Clemmer, 455 So. 2d 781, 783 (Miss. 1984).

uninsured motorist policy,[357] and the purchase of liability insurance by a public body does not waive its sovereign immunity from a punitive damage claim based on its employees' conduct.[358] Notwithstanding the court's recent decision in *James W. Sessums Co. v. McDaniel*,[359] the existence of liability insurance coverage for punitive damages should not be admissible in evidence.[360]

The statute of limitations on a claim of punitive damages is the same as that for the underlying claim, since there is no separate and distinct cause of action for punitive damage.[361] When punitive damages are awarded, the court may also award attorney fees and in an appropriate case damages for emotional distress may be considered.[362]

---

[357] *See* State Farm Mut. Auto. Ins. Co. v. Daughdrill, 474 So. 2d 1048, 1052 (Miss. 1985). This case was decided in response to a question certified to the Mississippi Supreme Court by the Court of Appeals for the Fifth Circuit. In responding, the court noted:

> The purpose of punitive damages is not accomplished in an uninsured motorist context. Such an award against an insurance company does not deter or punish similar future conduct, and no punishment is imposed on the uninsured motorist.
>
> . . . .
>
> . . . In fact, if carried to its extreme, such proposition would have the propensity of unusual results because they are assessed upon the net worth of the tortfeasor. Imagine therefore the quantity of an award from an uninsured financial derelict with little, if any, net worth.

Daughdrill, 474 So. 2d at 1052.

[358] Lawrence v. Virginia Ins. Reciprocal, 979 F.2d 1053, 1057 (5th Cir. 1992).

[359] 635 So. 2d 875 (Miss. 1994).

[360] In *McDaniel*, the court pointed to the existence of a contractual requirement that the defendant maintain liability insurance as a means to augment skimpy net worth proof to support a punitive damage award. Dissenting, Justice Hawkins noted that the record did not include the liability insurance policy and its existence was not a matter of argument on appeal. If the fact of such insurance had been objected to at trial, the law clearly supports its exclusion from evidence. *See* Ernest Yeager & Sons, Inc. v. Howell, 234 So. 2d 899 (Miss. 1970).

[361] *See* Vidrine v. Enger, 752 F.2d 107, 110 (5th Cir. 1984).

[362] *See* Blue Cross & Blue Shield v. Campbell, 466 So. 2d 833, 845 (Miss. 1984); Grenada Bank v. Lester, 89 So. 2, 3 (Miss. 1921). *See generally*, Herrin, *supra* note 103, at 542-49.

The court cannot require a jury to return punitive damages, the jury always has discretion not to award them.[363] However, in a bench trial, the judge becomes the fact finder and the question of whether to award punitive damages becomes a matter for his determination.[364] Punitive damages are not available for trial misconduct.[365]

VII. CONCLUSION

House Bill 1270 will bring a heightened focus to punitive damage. The higher burden of proof for punitive claims should mean increased scrutiny of evidence of punitive conduct and, consequently, fewer cases submitted to juries on this issue. The bifurcated proceeding eliminates the opportunity for the jury to confuse the duty of determining actual damage for the underlying liability claim with the issue of whether and how much to assess on a punitive claim. The concentration of trial counsel on the underlying purpose of each proceeding should result in less trial error and fewer appeals. Of course cases finding no liability for actual damage in the liability phase will result in shorter trial time. Even where the case goes forward to the bifurcated punitive hearing, establishment of liability for actual damages should promote settlement.

In the long run, heightened focus on the proof necessary to establish punitive conduct and specific factors which the jury should consider, "whether in aggravation or mitigation,"[366] should enhance the court's handling of these difficult cases. For example, it should be expected that trial counsel will present more detailed and better jury instructions on the issue of punitive damage than has been usual in Mississippi practice. Heretofore plaintiff counsel have naturally devoted primary trial preparation attention to the underlying cause of action—without a verdict for actual damage, the punitive claim could not be considered. Defense counsel have done likewise—defeat the underlying claim and punitive damage is beside the point. With the punitive claim often of secondary concern, jury instructions submitted by both plaintiff and defendant have often been little more than conclusory statements of the necessary predicate for jury award of punitive damage.[367]

---

[363] *See* Allen v. Ritter, 235 So. 2d 253, 256 (Miss. 1970); Southeastern Express Co. v. Thompson, 104 So. 80, 80 (Miss. 1925); Illinois Cent. R.R. v. Cole, 74 So. 766, 768 (Miss. 1917). *See also* Yazoo & M.V.R. v. May, 61 So. 449, 449 (Miss. 1913) (justifying punitive damages where plaintiff assailed by "vilest and most insulting epithets. . . . In this state, where women are respected and honored, and mothers are loved and revered, such profane and degrading words as were directed . . . were enough to produce an insult deeper and more lasting than in man's power to estimate." The plaintiff, defendant and all witnesses were male; no mothers were present).

[364] *See, e.g.,* Hunter v. Williams, 92 So. 2d 367, 369 (Miss. 1957); Ellis v. S. Pellegrini, Inc., 141 So. 273, 274 (Miss. 1932).

[365] Ciba-Geigy Corp. v. Murphree, No. 91-CA-00386, 1994 WL 321114 (Miss. July 7, 1994).

[366] Bell v. Morrison, 27 Miss. 68, 86 (1854).

A by-product of House Bill 1270 is its probable insulation of punitive damages from a successful *procedural* due process challenge. The United States Supreme Court decision in *Pacific-Mutual Life Insurance Co. v. Haslip*[368] held common-law punitive damages not per se unconstitutional.[369] Although the Mississippi Supreme Court, post-*Haslip*, rejected the argument that the Mississippi punitive damage system constituted a violation of due process,[370] the enactment of House Bill 1270 clearly enhances a finding of "fair procedures"[371] for consideration of punitive damages by Mississippi courts.[372] The *Haslip* Court approved the Alabama jury award made after the Alabama trial court instructed the jury on the deterrence and retribution purposes of punitive damages. The Alabama jury award was subject to post-trial review procedures both at the Alabama trial court and supreme court levels. The purpose of punitive damages under Alabama and Mississippi law are identical. Also, the Alabama post-trial review factors approved in *Haslip* are substantially identical to the post-trial review factors in section 11-1-65.[373] Moreover, the Mississippi factors are submitted to the jury for consideration, whereas Alabama's factors are only for post-trial review.[374]

---

[367] *See, e.g.*, MISS. MODEL JURY INSTRUCTIONS §§ 20.09, 20.10, 20.12 (1977) (stating nothing more than general purpose of punitive damages and shorthand description of conduct which warrants same). No proposed form suggestive of factors which a jury should consider exists. Although the 1992 Mississippi Model Jury Instructions are an improvement, they fail to provide the factors referenced by the court in Mutual Life Insurance Co. v. Estate of Wesson, 517 So. 2d 521, 532 (Miss. 1987) and C & C Trucking Co. v. Smith, 612 So. 2d 1092, 1105-07 (Miss. 1992). *See* MISS. MODEL JURY INSTRUCTIONS §§ 20.10, 20.11 (1982). This is not to criticize the model instructions, but rather to suggest that counsel often simply use the model instructions on punitive damages rather than to draft punitive damage instructions specific to the proof in a particular case and to attempt to focus the jury's attention on the particular factors which are appropriate for consideration on the question of punitive damages. In Vicksburg & Meridian Railroad v. Scanlan, 63 Miss. 413 (1886), the court wrote:

> It is remarkable that judges and writers in dealing with the subject of exemplary damages have employed a multitude of words as descriptive of the states of case proper for such damages, a habit adverted to in the case cited, but this does not justify stringing together in an instruction on the subject all of the expressions used by different writers in the effort to express the rule applicable to punitive damages. An instruction should be pertinent to the issues to be tried by the jury, and framed so as to enlighten and guide the jury in disposing of such issues.

Scanlan, 63 Miss. at 418. Regardless of the jury instruction practice with respect to issues of liability and damages, the *Scanlan* court's criticism of Mississippi punitive damage instructions is probably as applicable today as when made. Section 11-1-65's requirement of a bifurcated punitive proceeding, and its emphasis on factors for jury consideration, almost certainly will compel jury instructions which meet the *Scanlan* standard.

Unlike Mississippi, however, the Alabama system excludes consideration of a defendant's financial wealth from the trial.[375] The injection of wealth enhances the likelihood of a verdict influenced by prejudice, of jurors "consult[ing] their prejudices against corporations rather than their duty as impartial arbiters."[376] At best it is incongruous to suggest that identical damage resulting from identical conduct by a defendant with a net worth of $100,000 and by a defendant with a net worth of $1,000 should result in the larger defendant being punished 100 times more severely than the smaller. And yet, such a result seems the logical purpose of the wealth consideration—undoubtedly that is what is suggested by the argument that the amount of punitive damage should correlate to some percentage of net worth.

---

[368] 499 U.S. 1 (1991).

[369] *Haslip*, 499 U.S. at 17.

[370] Ivy v. General Motors Acceptance Corp., 612 So. 2d 1108, 1115-16 (Miss. 1992).

[371] TXO Production Corp. v. Alliance Research Corp. 113 S. Ct. 2711, 2720 (1993).

[372] Honda Motor Co. v. Oberg, 62 U.S.L.W. 4627 (U.S. June 24, 1994), highlights the importance of procedural fairness in a state's punitive damage scheme.

[373] The *Haslip* factors are: reasonable relationship between punitive award and harm likely to result; reasonable relationship between punitive award and harm that occurred; degree of reprehensibility of defendant conduct; duration of conduct; defendant awareness; concealment; existence and frequency of similar conduct; profitability to defendant of conduct; desirability of removing profit and having defendant sustain loss; financial position of defendant; cost of litigation; criminal sanctions for conduct, in mitigation; and other civil awards against defendant for same conduct, in mitigation. *Haslip*, 499 U.S. at 21-22.

[374] Dissenting in *Haslip*, Justice O'Connor noted that the post-trial review factors "could assist juries to make fair, rational decisions. Unfortunately, Alabama courts do not give . . . [these]. . . factors to the jury." *Haslip*, 499 U.S. at 52.

[375] *Haslip*, 499 U.S. at 22. "Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Id.*

Regardless of "fair procedures," the constitutional question of substantive due process insofar as a particular punitive damage award is concerned survives House Bill 1270. The *Haslip* Court said as much and Justice Scalia concurred in *TXO* on that premise, i.e., that there is a "'substantive due process' right that punitive damages be reasonable."[377] House Bill 1270 certainly enhances the fairness of punitive damage procedure, but only with persistent judicial insistence on a "reasonable relationship between [punitive] award" and "harm likely to result" or "that actually occurred" as required by section 11-1-65(1)(f)(ii)(1) and (2) of the Mississippi Code can the fairness of particular punitive damage awards be assessed. The Mississippi courts have heretofore had no "reasonable relationship" review rule. It would seem that such a rule will have to evolve in order to comply with section 11-1-65 and assure substantive due process.[378] A reasonable ratio between the amount of actual and punitive damage would make a lot of sense.[379]

---

[376] New Orleans, J. & G.N. R.R. v. Stratham, 42 Miss. 607, 630 (1869); *see also Oberg*, 62 U.S.L.W. at 4631 ("[T]he presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presence."); Clarence Morris, *Punitive Damage in Tort Cases*, 44 HARV. L. REV. 1173, 1191 (1931) (stating "that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare . . . . [J]urymen may be more interested in divesting vested interests than in attempting to fix penalties which will make for effective working of the admonitory function.").

[377] *TXO*, 113 S. Ct. at 2726 (Scalia, J., concurring); *see also Oberg*, 62 U.S.L.W. at 4628 ("Our recent cases have recognized that the Constitution imposes a substantive limit on the size of punitive damages awards.").

From the earliest cases, Mississippi courts have acknowledged the importance of the deep pocket defendant in punitive damage jurisprudence.[380] As discussed above, the exclusion of financial wealth proof would help moot the unseemly concept rejected by Justice Hawkins that "the bigger they are the more we ought to zap them." Establishing a reasonable ratio between actual and punitive damage awards—by court decision or legislation—would focus punitive damage jurisprudence clearly on what conduct should be punished by a quasi-criminal civil penalty, and *not* on how deep we can reach into the pocket of the rich or unpopular defendant without affecting constitutional sensibilities.

---

[378] MISS. CODE ANN. § 11-1-65(1)(f)(ii)(1) (Supp. 1993). The *TXO* Court affirmed, based in large part on comparison of the amount of the punitive award to the amount of harm likely to result from the defendant's conduct. *TXO*, 113 S. Ct. at 2721.

[379] The American College of Trial Lawyers has proposed that punitive damage be limited to twice the amount of compensatory damages, or $250,000, whichever is greater. AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT ON PUNITIVE DAMAGES OF THE COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE 15 (1989).

[380] *See, e.g.,* Eltingham v. Earhart, 7 So. 346, 346 (Miss. 1890) ("[t]he more affluent . . . the more able . . . to remunerate"); Tideway Oil Programs, Inc. v. Serio, 431 So. 2d 454, 460 n.1 (Miss. 1983) ("[M]ore than one or two plaintiffs demanding punitive damages . . . have not been actuated by any public spirit. Pursuit of filthy lucre plays its unseemly role.").

ALLOCATION OF FAULT: JOINT TORTFEASORS IN COURT AND THE ONES WHO SHOULD BE

Cheri D. Green[*]

Michael K. Graves[**]

I. INTRODUCTION

This Article is written to clarify and promote Mississippi's limitation of joint and several liability through the allocation of fault and the implementation of a cap on joint and several liability, as set forth in section 85-5-7 of the Mississippi Code.[1] In this article, we examine the statute and its goals of extending fairness through the equitable distribution of fault to all participants involved in a tortious occurrence rather than merely to those individuals whom the plaintiff chooses to sue. In doing so, we compare Mississippi's present comparative negligence statute and its purposes with the relevant law of other jurisdictions permitting allocation of fault. In addition, we explore the allocation of fault in cases involving settling joint tortfeasors and immune employers, subjects which naturally flow from the statute's express requirement to allocate fault. This Article does not, however, consider the numerous issues regarding contribution among joint tort-feasors which arise from implementation of section 85-5-7.

---

[*] *Cheri D. Green, Partner - Brunini Grantham Grower & Hewes; University of Mississippi, 1983 B.P.A., summa cum laude, 1986 J.D., cum laude.*

[**] *Michael K. Graves, Associate - Brunini Grantham Grower & Hewes; University of Southern Mississippi, 1989 B.A., highest honors, 1992 J.D., Mississippi College School of Law, with special distinction.*

[1] MISS. CODE ANN. § 85-5-7 (1991).

As evidenced by the Mississippi Legislature's repeal of section 85-5-5 of the Mississippi Code[2] and its subsequent adoption of section 85-5-7, Mississippi has moved into a new era of tort reform, and the state should not be held back by old precedent which allowed plaintiffs to take unfair advantage of the "deep pocket,"[3] regardless of that party's fault.

II. BACKGROUND

A. *Mississippi's Comparative Fault Rule*

Effective July 1, 1989, section 85-5-5 of the Mississippi Code was repealed.[4] The need to change Mississippi's contribution and comparative negligence scheme prompting this action was exemplified by Justice James Robertson's dissenting opinion in *Wilson v. Giordano Ins. Agency, Inc.*,[5] where he wrote, "[I]f one defendant tort-feasor is 20 percent at fault, he may under our current law be held liable for 100 percent of [the] plaintiff's damages with absolutely no right of contribution against the co-tort-feasor 80 percent at fault. This is unjust and, I submit, indefensible."[6]

---

[2] MISS. CODE ANN. § 85-5-5 (1972).

[3] *See, e.g.*, CAL. CIV. CODE § 1431.1 (West Supp. 1993) (stating that "the legal doctrine of joint and several liability, also known as 'the deep pocket rule,' has resulted in a system of inequity and injustice . . . ."); Mills v. MMM Carpets, Inc., 1 Cal. Rptr. 2d 813, 817 (1992) (citing CAL. CIV. CODE § 1431.1 (West Supp. 1993)).

[4] MISS. CODE ANN. § 85-5-5 (1972) was enacted by 1952 Miss. Laws 259, which modified the then existing absolute bar against contribution. *See* Thomas v. Rounds, 137 So. 894, 894 (Miss. 1931) (holding that joint tort-feasors were not entitled to contribution). Section 85-5-5 was repealed by, and section 85-5-7 enacted by 1989 Miss. Laws 311.

[5] 475 So. 2d 414 (Miss. 1985).

[6] *Wilson*, 475 So. 2d at 420 (Robertson, J. dissenting); *cf.* United States v. Reliable Transfer Co., Inc., 421 U.S. 397, 411 (1975) (rejecting rule of divided damages in admiralty law in favor of more equitable rule of comparative fault).

In moving toward a more equitable distribution of liability predicated upon responsibility for one's own acts and not the acts of others (as was often the case under section 85-5-5), section 85-5-7 was adopted.[7] Through this action, Mississippi appeared to rejoin[8] the ranks of jurisdictions that have recognized that fairness and justice are better served by modernizing existing comparative negligence statutes[9] to permit the less guilty joint tort-feasor[10] to seek contribution at some level.[11]

---

[7] *See* State v. Traylor, 56 So. 521, 522 (Miss. 1911) ("It is perfectly competent, in fact, necessary, in order that we may properly understand what the Legislature meant by this section, not only to look at the present law, but also at the law which was in existence prior to the enactment of this statute.").

[8] Mississippi has historically been a leader in applying comparative fault. MISS. CODE ANN. § 11-7-15 (1972), enacted in 1910, provided that contributory negligence on behalf of the plaintiff will not completely bar recovery. *Id.* Rather, the jury was to determine the amount of negligence attributable to the plaintiff and any award was reduced accordingly. *Id.; see, e.g.,* McDaniel v. Ritter, 556 So. 2d 303, 317 (Miss. 1989) (holding civil justice and economic efficiency promoted by allowing diminution of award, and not bar from recovery).

---

[9] Determination of comparative fault is allowed in 46 states. Pure comparative fault (reduction by plaintiff's proportion of fault) is followed in 13 states. The "pure" form is codified by statute in six jurisdictions. *See, e.g.,* ARIZ. REV. STAT. ANN. § 12-2505 (Supp. 1993); LA. CIV. CODE ANN. art. 2323 (West Supp. 1993); MISS. CODE ANN. § 11-7-15 (1972); N.Y. CIV. PRAC. L. & R. 1411 (McKinney 1976); R.I. GEN. LAWS § 9-20-4 (1985); WASH. REV. CODE ANN. § 4.22.005 (West 1988). Other jurisdictions have adopted the pure form by judicial interpretation. *See* Kaatz v. Alaska, 540 P.2d 1037, 1049 (Alaska 1975) (codified at ALASKA STAT. § 09.17.080 (Supp. 1993)); Li v. Yellow Cab Co., 532 P.2d 1226, 1230 (Cal. 1975); Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973); Hilen v. Hays, 673 S.W.2d 713, 719 (Ky. 1984); Placek v. City of Sterling Heights, 275 N.W.2d 511, 520 (Mich. 1979); Gustafson v. Benda, 661 S.W.2d 11, 15-16 (Mo. 1983); Scott v. Rizzo, 634 P.2d 1234, 1241 (N.M. 1981).

Modified comparative negligence is recognized in 33 states in various forms. Twenty-one states apply the "50% rule," allowing recovery if the plaintiff's negligence is not greater than the defendant(s), although jurisdictions vary as to whether the fault of absent tort-feasors is to be considered in this computation. *See* CONN GEN. STAT. ANN. § 52-572h (West 1991); DEL. CODE ANN. tit. 10, § 8132 (Supp. 1992); HAW. REV. STAT. § 663-31 (1985); ILL. ANN. STAT. ch. 735, para. 5/2-1116 (Smith-Hurd 1986); IND. CODE ANN. §§ 34-4-33-3 to -4 (West Supp. 1986); IOWA CODE ANN. § 668.3 (West 1987); MASS. GEN. LAWS ANN. ch. 231 § 85 (West 1985); MINN. STAT. ANN. § 604.01(1) (West Supp. 1993); MONT. CODE ANN. § 27-1-702 (1993); NEV. REV. STAT. § 41.141 (Supp. 1991); N.H. REV. STAT. ANN. § 507: 7-d (Supp. 1992); N.J. STAT. ANN. § 2A: 15-5.1 (West 1987); OHIO REV. CODE ANN. § 2315.19 (Baldwin 1990); OKLA. STAT. ANN. tit. 23, §§ 13, 14 (West 1991); OR. REV. STAT. § 18.470 (1988); 42 PA. CONS. STAT. ANN. § 7102 (1982 & Supp. 1993); TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001, .012 (West Supp. 1993); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1993); WIS. STAT. ANN. § 895.045 (West Supp. 1993); WYO. STAT. § 1-1-109 (1988); Nelson v. Concrete Supply Co., 399 S.E.2d 783, 784 (S.C. 1991) (judicially adopting 50% rule).

Ten states have adopted the "49% rule," thereby allowing the plaintiff to recover if his negligence is less than that of the defendant(s). Again, however, jurisdictions vary as to whether to consider the fault of absent tort-feasors. *See* ARK CODE ANN. § 16-64-122 (Michie Supp. 1993); COLO. REV. STAT. ANN. § 13-21-111 (West 1987); GA. CODE ANN. § 51-12-33 (Supp. 1993); IDAHO CODE § 6-801 (1990); KAN. STAT. ANN. § 60-258a (Supp. 1992); ME. REV. STAT. ANN. tit. 14, § 156 (West 1980); N.D. CENT. CODE §§ 32-03.2-01 to -03 (Supp. 1993); UTAH CODE ANN. § 78-27-38 (1992); McIntyre v. Balentine, 833 S.W.2d 52, 57 (Tenn. 1992) (judicially adopting 49% rule); Bradley v. Appalachian Power Co., 256 S.E.2d 879, 885 (W. Va. 1979) (judicially adopting 49% rule).

Two states use a "slight-to-gross" negligence comparison. *See* NEB. REV. STAT. § 25-21,185 (1992); S.D. CODIFIED LAWS ANN. § 20-9-2 (1987).

For a listing of all states' comparative negligence schemes, see *McIntyre*, 833 S.W.2d at 56-57 nn.3-6.

Section 85-5-7,[12] in part, abolished joint and several

---

[10] Although Mississippi has not statutorily defined "joint tort-feasors", many jurisdictions have statutorily adopted the definition provided in the 1939 version of the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1, 12 U.L.A. 57 (1975). "'[J]oint tortfeasors' means two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them." *Id.; see, e.g.,* N.M. STAT. ANN. § 41-3-1 (Michie 1978) (adopting above cited definition of "joint tort-feasors"). *But see* H. Wesley Williams, III, Comment, *1989 Tort "Reform" In Mississippi: Modification of Joint And Several Liability And The Adoption Of Comparative Contribution,* 13 MISS. C. L. REV. 133, 136 n.19 (1992) (noting apparent inaccuracy of definition of "joint tort-feasors" provided in Granquist v. Crystal Springs Lumber Co., 1 So. 2d 216 (Miss. 1941)). In *Granquist,* the court stated:

> The term "joint tort feasors" means that two or more persons are the joint participants or joint actors, either by omission or commission, in the wrongful production of an injury to a third person. There the act or omission of each is his own act or omission, but the acts or omissions are concurrent in, or contribute to, the production of the wrongful injury, so that each actor is, on his own account, liable for the resulting damages.

Granquist, 1 So. 2d at 218.

Other jurisdictions have statutorily adopted a definition of "joint tort-feasor" substantially similar to that found in the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1, 12 U.L.A. 57 (1975). *See, e.g.,* IDAHO CODE § 6-803(4) (1990) ("'[J]oint tortfeasor' means one (1) of two (2) or more persons jointly or severally liable in tort for the same injury to person or property, whether judgment has been recovered against all or some of them."); *cf.* Adams v. Johnston, 860 P.2d 423, 429 n.5 (Wash. Ct. App. 1993) ("Joint tortfeasors are those persons acting independently whose conduct concurred and caused an indivisible injury.") (citation omitted).

[11] *See Wilson,* 475 So. 2d at 419 n.1 (Robertson, J., dissenting) (identifying states that have abolished bar against contribution among joint tort-feasors); *see also McIntyre,* 833 S.W.2d at 58 (holding that allocation of fault abolishes joint and several liability).

[12] Section 85-5-7 of the Mississippi Code provides:

> (1) As used in this section "fault" means an act or omission of a person which is a proximate cause of injury or death to another person or persons, damages to property, tangible or intangible, or economic injury, including but not limited to negligence, malpractice, strict liability, absolute liability or failure to warn. "Fault" shall not include any tort which results from an act or omission committed with a specific wrongful intent.
>
> (2) Except as may be otherwise provided in subsection (6) of this section, in any civil action based on fault, the liability for damages caused by two (2) or more persons shall be joint and several only to the extent necessary for the person suffering injury, death or loss to recover fifty percent (50%) of his recoverable damages.
>
> (3) Except as otherwise provided in subsections (2) and (6) of this section, in any civil action based on fault, the liability for damages caused by two (2) or more persons shall be several only, and not joint and several and a joint

liability[13] except as is necessary to ensure that the plaintiff recovers 50% of his recoverable damages.[14] As a consequence of this change from "joint and several" to "several" liability, allocation of fault between joint tort-feasors is necessary and mandated by statute[15] for the first time since comparative negligence was adopted in Mississippi.[16] Concomitantly, contribution between joint tort-feasors is now allocated not on a pro rata

---

> tort-feasor shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault. In assessing percentages of fault an employer and the employer's employee or a principal and the principal's agent shall be considered as one (1) defendant when the liability of such employer or principal has been caused by the wrongful or negligent act or omission of the employee or agent.
>
> (4) Any defendant held jointly liable under this section shall have a right of contribution against fellow joint tort-feasors. A defendant shall be held responsible for contribution to other joint tort-feasors only for the percentage of fault assessed to such defendant.
>
> (5) Nothing in this section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly noted herein.
>
> (6) Joint and several liability shall be imposed on all who consciously and deliberately pursue a common plan or design to commit a tortious act, or actively take part in it. Any person held jointly and severally liable under this section shall have a right of contribution from his fellow defendants acting in concert.
>
> (7) In actions involving joint tort-feasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault.
>
> (8) Nothing in this section shall be construed to create a cause of action. Nothing in this section shall be construed, in any way, to alter the immunity of any person.

MISS. CODE ANN. § 85-5-7 (1991).

[13] MISS. CODE ANN. § 85-5-7 (1991). Joint and several liability still exists, however, if the joint tort-feasors "consciously and deliberately" pursue a common plan or design to commit a tortious act or actively participate in the tortious act. MISS. CODE ANN. § 85-5-7(6) (1991). Even this provision, however, maintains the equitable principle that a party should not be held responsible for more than that party's proportionate share of fault by specifically allowing contribution among these joint tort-feasors. *Id.*

[14] MISS. CODE ANN. § 85-5-7(2)&(3) (1991).

[15] *Id.* § 85-5-7(3)&(7).

[16] *See supra* note 8.

basis,[17] but by the percentage of fault attributable to each joint tort-feasor.[18]

B. *The Equitable Underpinnings of Mississippi's Comparative Fault Rule*

"The cornerstone principle of a comparative fault system is that each person who contributes to cause an injury must bear the burden of reparation for that injury in exact proportion to his share of the total fault which contributed to cause the injury."[19] This principle evolved from recognition of the inequity in absolutely barring an injured plaintiff from recovery merely because the plaintiff may have also been negligent,[20] however slight, to recognition of the inequity in holding a tort-feasor liable for damages caused by another.[21] Thus, under the equitable system of comparative fault, a negligent plaintiff, rather than being absolutely foreclosed from pursuing recovery from other negligent participants, only bears the burden of damage directly attributable to the plaintiff's own fault. Similarly, under comparative fault, it logically and fairly[22] follows that tort-feasors be required to shoulder only the burden of damage directly attributable to the individual tort-feasor.[23] In this scheme, equity among all actors is achieved, and the plaintiff's right to recover from those responsible for the plaintiff's damage is preserved regardless of the plaintiff's degree of fault.

---

[17] Celotex Corp. v. Campbell Roofing & Metal Works, Inc., 352 So. 2d 1316, 1319 (Miss. 1977) (contribution determined on pro rata basis is dependent upon number of defendants, and not percentage of actual fault). *See* McDermott, Inc. v. AmClyde, 62 U.S.L.W. 4241, 4243 n.9 (U.S. 1994) (recognizing significant difference in "pro rata" and "percentage of fault" recovery).

[18] MISS. CODE ANN. § 85-5-7(4)&(7) (1991).

[19] Leonard E. Eilbacher, *Comparative Fault And The Nonparty Tortfeasor*, 17 IND. L. REV. 903, 903 (1984); *see, e.g.*, Bode v. Clark Equip. Co., 719 P.2d 824, 827 (Okla. 1986) ("The cornerstone of comparative negligence is founded on attaching liability in direct proportion to the fault of each entity whose negligence caused the damage.").

[20] *See* Yazoo & M.V.R. Co. v. Carroll, 60 So. 1013, 1014 (Miss. 1913). In *Yazoo & M.V.R. Co.*, the court stated:

> Prior to [passage of the comparative negligence statute,] contributory negligence—any contributory negligence, slight, ordinary, or gross, if negligence can in fact be so classified—barred a recovery, and the manifest legislative purpose in enacting it was simply to alter the rule on this subject, which had been established by the courts, so that such negligence should not thereafter bar recovery, but should simply cause a diminution of the amount thereof.

Id.; see, e.g., Li v. Yellow Cab Co., 532 P.2d 1226, 1232 (Cal. 1975) (listing jurisdictions which "have abrogated the 'all or nothing' rule of contributory negligence and have enacted in its place general apportionment statutes calculated in one manner or another to assess liability in proportion to fault") (footnote omitted).

[21] *See, e.g.*, Laubach v. Morgan, 588 P.2d 1071, 1075 (Okla. 1978) ("The underlying principle of comparative negligence is founded on attaching liability in direct proportion to the respective fault of each person whose negligence caused the damage."); *see also* MISS. CODE ANN. § 85-5-7(3) (1991) (providing that "a joint tort-feasor shall be liable *only* for the amount of damages allocated to him *in direct proportion* to his percentage of fault") (emphasis added).

In order to achieve true equity in this scheme, it is necessary that the tortious conduct of *all* participants to the occurrence, including "absent tort-feasors,"[24] be considered and apportioned according to the respective degree of fault of each tort-feasor. "[T]he failure to consider the negligence of *all* tortfeasors, whether parties or not, prejudices the joined defendants who are thus required to bear a greater portion of the plaintiff's loss than is attributable to their fault."[25] This failure to consider the fault of absent tort-feasors in the apportionment process skews the determination of the percentages of fault to be attributed to tort-feasors before the court[26]

---

[22] *See, e.g.*, McIntyre v. Balentine, 833 S.W.2d 52, 58 (Tenn. 1992) ("[F]airness and efficiency require that defendants called upon to answer allegations in negligence be permitted to allege, as an affirmative defense, that a nonparty caused or contributed to the injury or damage for which recovery is sought."); *see also* Bowman v. Barnes, 282 S.E.2d 613, 620 (W. Va. 1981) (holding that where absent party cannot be brought into suit because of immunity or because beyond jurisdiction of court, "it would appear to be unfair to preclude a consideration of the plaintiff's contributory negligence in regard to this absent party").

[23] In American Motorcycle Ass'n v. Superior Court, 578 P.2d 899 (Cal. 1978), the court stated:

> [H]aving already noted that under the comparative negligence doctrine a plaintiff's recovery should be diminished only by that proportion which the plaintiff's negligence bears to that of all tortfeasors, we think it only fair that a defendant who may be jointly and severally liable for all of the plaintiff's damages be permitted to bring other concurrent tortfeasors into the suit.

Id. at 917 (citation omitted).

An example of the potential prejudice to named party-defendants resulting from failure to consider the fault of absent tort-feasors in the apportionment process is provided in Dix & Assoc. Pipeline Contractors v. Key, 799 S.W.2d 24 (Ky. 1990), where the court held:

> Whereas it is fundamentally unfair for a plaintiff who is only 5 percent at fault to be absolutely barred from recovery from a defendant who is 95 percent at fault, it is equally and fundamentally unfair to require one joint tort-feasor who is only 5 percent at fault to bear the entire loss when another tort-feasor has caused 95 percent of the loss. Such a result is possible if the only tort-feasor named by the plaintiff in a law suit is only 5 percent at fault and another tort-feasor who is 95 percent at fault is [not named by the plaintiff and thus cannot be considered in the apportionment of fault].

Id. at 27.

---

[24] "Absent tort-feasors" as used in this Article refers to tort-feasors who are not before the court because the tort-feasor is unknown, has been released pursuant to a settlement, or is immune from liability.

Absent tort-feasors are also frequently referred to as "phantom tort-feasors." *See, e.g.*, Haney v. Francewar, 588 So. 2d 1172, 1178 (La. Ct. App. 1991) ("'The term "phantom tortfeasor" is often used to denote any putative tortfeasor not made a party to the lawsuit, i.e., any non-party tortfeasor.'" (quoting David W. Robertson, *The Louisiana Law of Comparative Fault: A Decade of Progress*, 1 LA. LAW PRAC. SERIES, Ch. V, at 57 (1991)).

[25] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 67, at 475-76 (5th ed. 1984) (emphasis added) (footnote omitted).

[26] Courts favorably considering this issue have employed divergent rationales for allowing the fault of absent tort-feasors to be considered. A number of these jurisdictions recognize that consideration of the fault of absent tort-feasors is necessary to determine the proper allocation of fault to the *named party-defendants* from whom the plaintiff seeks recovery. *See, e.g.*, Conkright v. Ballantyne of Omaha, Inc., 496 F. Supp. 147, 149 (W.D. Mich. 1980) (holding that settling defendant should remain party to case so that jury can determine proportionate degree of fault attributable to each named defendant for contribution purposes); Dietz v. General Elec. Co., 821 P.2d 166, 171 (Ariz. 1991) (holding that percentage of fault of named party-defendant must be reduced by percentage of fault attributable to absent tort-feasor); Pocatello Indus. Park Co. v. Steel West, Inc., 621 P.2d 399, 403 (Idaho 1980) ("'[T]rue apportionment cannot be achieved unless that apportionment includes all tortfeasors guilty of causal negligence . . . .'") (citations omitted); Lines v. Ryan, 272 N.W.2d 896, 903 (Minn. 1978) ("'If the total combined negligence is to equal 100%, then the percentage contribution by all persons whose conduct potentially contributed to the accident . . . , whether or not a party to the proceeding, must be submitted.'") (quoting 4 MINNESOTA PRACTICE, *Jury Instruction Guides* (2d ed. 1974) JIG II, 148 S, Comment, at 128)); Bartlett v. New Mexico Welding Supply, Inc., 646 P.2d 579, 586 (N.M. Ct. App. 1982) (stating fault of nonparty must be considered in order that named defendant be held responsible only for amount of damage proportionate to defendant's degree of fault); Bartels v. City of Williston, 276 N.W.2d 113, 119 (N.D. 1979) (holding that allocation of causal negligence of settling tort-feasors "is merely a part of the mechanics by which the percentage of causal negligence of the non-settling tort-feasor is determined.") (citation omitted).

Other jurisdictions have recognized the necessity of considering the fault of absent tort-feasors in order to accurately and definitively resolve the percentage of the and makes impossible an allocation of damages in direct proportion to a tort-feasor's percentage of fault as mandated by the Mississippi Legislature.[27] According to one court, "To limit the jury to viewing the negligence of only one tortfeasor and then ask it to apportion that negligence to the overall wrong is to ask it to judge a forest by observing just one tree. It cannot, and more important should not, be done."[28] Thus, to give full effect to the Mississippi Legislature's apparent purpose in adopting the present scheme of several liability predicated upon comparative fault, Mississippi courts, in all cases involving multiple tort-feasors, must consider the fault of any absent tort-feasor in its apportionment process.[29]

---

plaintiff's fault. *See, e.g.*, *Bowman*, 282 S.E.2d at 621 ("[I]n order to obtain a proper assessment of the total amount of the plaintiff's contributory negligence under our comparative negligence rule, it must be ascertained in relation to all of the parties whose negligence contributed to the accident, and not merely those defendants involved in the litigation.").

[27] *See* MISS. CODE ANN. § 85-5-7(3) (1991). As was explained in June F. Entman, *The Nonparty Tortfeasor*, 23 MEM. ST. U. L. REV. 105 (1992):

> When the Tennessee Supreme Court adopted comparative fault in *McIntyre v. Balentine*, it envisioned that "a particular defendant will henceforth be liable only for the percentage of a plaintiff's damage occasioned by that defendant's negligence." Pursuant to that vision, the court announced that tortfeasors will no longer be jointly liable for all of the plaintiff's injuries. *To achieve its intended result of holding a tortfeasor liable for only his own percentage of fault, the court found it necessary to provide a mechanism for the factfinder to account for that percentage of fault attributable, not only to the plaintiff and the defendant, but also to others who are not parties to the action.* The court provided such a mechanism by creating a nonparty tortfeasor affirmative defense. If a defendant pleads that a nonparty contributed to the injuries for which the plaintiff seeks recovery, the factfinder must assign to that nonparty the percentage of the total negligence for which it finds the nonparty responsible.

Id. at 105 (emphasis added) (footnote omitted).

[28] Paul v. N.L. Indus., 624 P.2d 68, 70 (Okla. 1980).

[29] In interpreting Kansas' comparative negligence statute which, like Mississippi's recently enacted statute on comparative fault, abandoned the rule of contributory negligence and abolished joint and several liability to require consideration of the fault of all participants to the occurrence, the court in Brown v. Keill, 580 P.2d 867 (Kan. 1978), stated:

Unfortunately, section 85-5-7 is, at first blush, somewhat unclear in stating "whose" fault must be considered in the apportionment process.[30] However, this Article shows that, in concert with the equitable principles underlying comparative fault,[31] section 85-5-7 requires that the fault of *all participants to the occurrence*, including any absent tort-feasor, must be considered in the apportionment of fault.[32]

> The perceived purpose in adopting [Kansas' comparative negligence statute] is fairly clear. The legislature intended to equate recovery and duty to pay to degree of fault. Of necessity, this involved a change of both the doctrine of contributory negligence and of joint and several liability. There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the co-defendant to pay more than his fair share of the loss. . . . Previously, when the plaintiff had to be totally without negligence to recover and the defendants had to be merely negligent to incur an obligation to pay, an argument could be made which justified putting the burden of seeking contribution on the defendants. Such an argument is no longer compelling because of the purpose and intent behind the adoption of the comparative negligence statute.
>
> It appears more reasonable for the legislature to have intended to relate duty to pay to the degree of fault. Any other interpretation of [Kansas' comparative negligence statute] destroys the fundamental conceptual basis for the abandonment of the contributory negligence rule and makes meaningless the [abolition of joint and several liability].

Id. at 873-74; *see also Dietz*, 821 P.2d at 169 ("[A]llowing the factfinder to consider the fault of an immune nonparty serves the objectives of statutes enacting comparative negligence and contribution among joint tortfeasors, and abolishing joint liability."); Entman, *supra* note 27, at 124 ("[I]nsofar as the court has abolished joint and several liability, a tortfeasor's duty to compensate the plaintiff is now limited to that tortfeasor's percentage of fault. The nonparty tortfeaser [sic] affirmative defense is nothing more than a procedural device designed to articulate [this] substantive goal.").

[30] *See generally* David C. Sobelsohn, *Comparing Fault*, 60 IND. L.J. 413, 416 (1985) (stating that jurisdictions adopting comparative fault system must ultimately and definitively resolve "whose" fault is to be considered).

[31] *See supra* notes 19-23 and accompanying text.

[32] *See Brown*, 580 P.2d at 869 (emphasis added). In *Brown*, the court stated:

> The intent and purpose of the legislature in adopting [a comparative negligence statute abandoning contributory negligence and abolishing joint and several liability] was to impose individual liability for damages based on the proportionate fault of *all parties to the occurrence* which gave rise to the

III. ANALYSIS

One of the cornerstones of the concept of comparative fault is that a tort-feasor should be held accountable only for the amount of damage directly proportionate to his own degree of fault.[33] To properly ascertain an individual tort-feasor's degree of fault, the fault of *all* participants to the occurrence must be considered.[34] Consideration of the fault of all participants to the occurrence necessarily includes consideration of the fault of absent tort-feasors. Failure to account for these tort-feasors' degree of fault would skew the apportionment process, resulting in an inequitable assessment of liability to the tort-feasors who are before the court.[35] The purpose of the Missis-

---

> injuries and damages even though one or more parties cannot be joined formally as a litigant or be held legally responsible for his or her proportionate fault.

Id.; *see also Bartlett*, 646 P.2d at 586 (favorably quoting above passage from *Brown v. Keill*).

[33] *See supra* notes 19-23 and accompanying text.

[34] *See supra* notes 22-29 and accompanying text.

[35] *See supra* notes 24-29 and accompanying text. Fourteen states have statutes which specifically allow consideration of the fault of all or specifically identified absent tort-feasors in the allocation process. *See* ALASKA STAT. § 09.17.080 (Supp. 1993); ARIZ. REV. STAT. ANN. § 12-2506 (Supp. 1993); COLO. REV. STAT. ANN. § 13-21-111.5 (West Supp. 1993); CONN. GEN. STAT. ANN. § 52-572h (West 1991); IND. CODE ANN. § 34-4-33-5 (West 1986); IOWA CODE ANN. § 668.3 (West 1987); KAN. STAT. ANN. § 60-258a (Supp. 1992); KY. REV. STAT. ANN. § 411.182 (Baldwin 1991); LA. CODE CIV. PROC. ANN. art. 1812 (West 1987); NEB. REV. STAT. § 25-21,185.11 (1992); N.M. STAT. ANN. § 41-3A-1 (Michie 1989); TEX. REV. CIV. STAT. ANN. art. 33.003 (West Supp. 1993); 1993 Wash. Legis. Serv. 496 (West) (amending WASH. REV. CODE ANN. § 4.22.070 (West 1988)); WYO. STAT. § 1-1-109 (1988).

In an overwhelming majority of states which have a comparative negligence statute that does not specifically address consideration of the fault of absent tort-feasors (similar to MISS. CODE ANN. § 85-5-7 (1991)) the statutes have been interpreted to allow consideration of all or specifically identified absent tort-feasors in the allocation process. *See* Gormly v. I. Lazar & Sons, 926 F.2d 47, 48 (1st Cir. 1991) (applying law of Rhode Island, allowing immune subcontractor/employer's fault to be considered under R.I. GEN. LAWS § 9-20-4 (1985)); Kathios v. General Motors Corp., 862 F.2d 944, 950 (1st Cir. 1988) (considering predecessor statute to N.H. REV. STAT. ANN. § 507:7-d (Supp. 1992), and holding that, in order to make proper determination of plaintiff's fault by which any award is to be diminished, plaintiff's fault must be compared to any other

---

potential causes and not only "in relation to a particular defendant"); *Conkright*, 496 F. Supp. at 152 (holding that, under MICH. COMP. LAWS ANN. § 600.2925b (West 1993), degree of settling tort-feasor's fault must be assessed for contribution purposes); Stacey v. Bango Punta Corp., 108 F.R.D. 72, 74 (D. Me. 1985) (interpreting ME. REV. STAT. ANN. tit. 14, § 156 (West 1980) to allow non-settling tort-feasor option to have liability reduced by settling tort-feasor's proportionate fault); Mills v. MMM Carpets, Inc., 1 Cal. Rptr. 2d 813, 814 (1992) (interpreting CAL. CIV. CODE § 1431.2 (West Supp. 1993) as requiring that "apportionment of liability [under] section 1431.2 must take into account the fault of all tortfeasors, whether or not they are named as defendants"); Fabre v. Marin, 623 So. 2d 1182, 1185-86 (Fla. 1993) (holding that, under FLA. STAT. ANN. § 768.81(3) (West Supp. 1993), "party" means all entities regardless of whether named as defendant(s)); Espaniola v. Cawdrey Mars Joint Venture, 707 P.2d 365, 373 (Haw. 1985) (holding that, under HAW. REV. STAT. § 663-31 (1985), fault of immune employer is admissible for determination of appropriate degrees of fault); Pocatello Indus. Park Co. v. Steel West, Inc., 621 P.2d 399, 403 (Idaho 1980) (interpreting IDAHO CODE § 6-802 (1990) to require that "'the jury . . . have the opportunity to consider the negligence of all parties to the transaction.'" (quoting Connar v. West Shore Equip., 227 N.W.2d 660, 662 (Wis. 1975)); Doyle v. Rhodes, 461 N.E.2d 382, 385 (Ill. 1984) (holding that, under ILL. ANN. STAT. ch. 735, para. 5/2-1116 (Smith-Hurd 1993), workers' compensation does not protect employer from allocation of fault); Lines v. Ryan, 272 N.W.2d 896, 903 (Minn. 1978) (interpreting MINN. STAT. ANN. § 604.01 (West Supp. 1993) to require that "'the apportionment must include all whose negligence may have contributed to the arising of the cause of action.'" (quoting Connar v. West Shore Equip., 227 N.W.2d 896, 903 (Wis. 1975))); Young v. Latta, 559 A.2d 465, 466 (N.J. Super. Ct. App. Div. 1989) (holding that, under N.J. STAT. ANN. § 2A:15-5.2 (West Supp. 1993), jury may allocate fault between settling and non-settling tort-feasors, even in absence of claim for contribution), *aff'd*, 589 A.2d 1020 (N.J. 1991); Penzell v. New York, 466 N.Y.S.2d 562, 567 (N.Y. Ct. Cl. 1983) (interpreting N.Y. CIV. PRAC. L. & R. 4533-b (McKinney 1987) to require that any award to plaintiff be reduced by relative culpability of released tort-feasor); Bartels v. City of Williston, 276 N.W.2d 113, 118 (N.D. 1979) (holding that, under N.D. CENT. CODE § 9-10-07 (1987), "'the percentage of causal negligence . . . of the nonsettling defendant . . . can only be determined by a proper allocation of all the causal negligence . . . of all the joint tortfeasors.'" (quoting Bielski v. Schulze, 114 N.W.2d 105, 111-12 (Wis. 1962))); Paul v. N.L. Indus., 624 P.2d 68, 69 (Okla. 1980) (interpreting OKLA. STAT. ANN. tit. 23, § 13 (West 1987) to require that "the negligence of tort-feasors not parties to the lawsuit . . . be considered by the trial jury in order to properly apportion the negligence of those tortfeasors who are parties."); Stark v. Posh Constr. Co., 162 A.2d 9, 12 (Pa. 1960) (holding that, under 42 PA. CONS. STAT. ANN. § 7102 (1982 & Supp. 1993), equity dictates that employer's fault be considered); Freeman v. Berg, 482 N.W.2d 32, 33 (S.D. 1992) (holding that, under S.D. CODIFIED LAWS ANN. § 15-8-15.2 (Supp. 1993), settling defendant remained named defendant at trial for purposes of apportionment of fault); Sullivan v. Scoular Grain Co., 853 P.2d 877, 880 (Utah 1993) (holding that failure to include immune employer in determination of fault is contrary to allocation requirement provided in UTAH CODE ANN. §§ 78-27-38 to -40 (1992)); Connar v. West Shore Equip., 227 N.W.2d 660, 662 (Wis. 1975) (interpreting WIS. STAT. ANN. § 895.045 (West Supp. 1993) to require that, "when apportioning negligence, a jury must have the opportunity to consider the negligence of all parties sippi Legislature in providing for an apportionment of fault to all participants to the occurrence, consistent with the equitable principles undergirding comparative fault, is clear upon careful scrutiny of the text of section 85-5-7.

A. *The "Fault" With Mississippi's Comparative Fault Statute*

The allocation of fault through application of section 85-5-7, subsections (3) and (7), is an equalizing act of fairness for named party-defendants, just as section 11-7-15 of the Mississippi Code[36]—abolishing the "all-or-nothing" rule of contributory negligence—was for plaintiffs.[37] Under Mississippi's prior

---

to the transaction, whether or not they be parties to the lawsuit"); *see also* McIntyre v. Balentine, 833 S.W.2d 52, 56-58 (Tenn. 1992) (adopting comparative negligence and ruling that where named defendant raises fault of nonparty as affirmative defense, jury must consider fault of nonparty in allocation of fault); Bowman v. Barnes, 282 S.E.2d 613, 621 (W. Va. 1981) ("[I]n order to obtain a proper assessment of the total amount of the plaintiff's contributory negligence . . . , it must be ascertained in relation to all of the parties whose negligence contributed to the accident, and not merely those defendants involved in the litigation.") (citing Bradley v. Appalachian Power Co., 256 S.E.2d 879, 885 (W. Va. 1979)).

[36] Miss. Code Ann. § 11-7-15 (1972); *see supra* note 8.

[37] Allocating fault among joint tort-feasors is recognized in some form in 45 states. *See* Alaska Stat. § 09.17.080 (Supp. 1993); Ariz. Rev. Stat. Ann. § 12-2502 (Supp. 1993); Ark. Code Ann. § 16-61-202 (1987); Cal. Civ. Proc. Code § 1714 (West 1982) (as interpreted in American Motorcycle Ass'n v. Superior Court, 578 P.2d 899, 917 (Cal. 1978)); Colo. Rev. Stat. Ann. §§ 13-21-111, 13-21-111.5 (West 1987 & Supp. 1993); Conn. Gen. Stat. Ann. § 52-572h (West 1991); Del. Code Ann. tit. 10, § 6302 (1974); Fla. Stat. Ann. § 768.81(3) (West Supp. 1993); Ga. Code Ann. § 51-12-33 (Supp. 1993); Haw. Rev. Stat. §§ 663-12, 663-17(c) (1985); Idaho Code §§ 6-801 to -803 (1990); Ill. Ann. Stat. ch. 735, para. 5/2-1117 (Smith-Hurd 1993); Ind. Code Ann. § 34-4-33-5 (West 1986); Iowa Code Ann. § 668.3 (West 1987); Kan. Stat. Ann. § 60-258(a) (Supp. 1992); Ky. Rev. Stat. & R. Serv. Ann. § 411.182 (Baldwin 1991); La. Civ. Code Ann. art. 2323 (West Supp. 1993); Me. Rev. Stat. Ann. tit. 14, § 156 (West 1980); Mich. Comp. Laws Ann. § 600.2925b (West Supp. 1993); Minn. Stat. Ann. § 604.01 (West Supp. 1993); Mo. Ann. Stat. § 537.067 (Vernon 1988) (in special circumstances); Mont. Code Ann. § 27-1-703 (1993); Neb. Rev. Stat. § 25-21,185.10 (Supp. 1992); Nev. Rev. Stat. Ann. § 41.141 (Michie 1986); N.H. Rev. Stat. Ann. § 507:7-d, -e (Supp. 1992); N.M. Stat. Ann. § 41-3-2 (Michie 1989); N.Y. Civ. Prac. L. & R. 1402 (McKinney 1976); N.C. Gen. Stat. § 97-10.2 (Supp. 1991); N.D. Cent. Code § 9-10-07 (1987); Ohio Rev. Code Ann. § 2307.31 (Baldwin 1990); Okla. Stat. Ann. tit. 12, § 832 (West 1988) (as explained in Nat'l Union Fire Ins. Co. v. A.A.R. Western Skyways, Inc., 784 P.2d 52, 57

rule of joint and several liability,[38] representing the joint tort-feasor who was less at fault than his counterpart was a dangerous proposition. Regardless of the fault of the other joint tort-feasor, the less negligent tort-feasor could share the burden of any award equally or, in a worst-case scenario, shoulder the entire burden should the tort-feasor's counterpart be judgment-proof, or should the plaintiff opt to execute its judgment against only one of the joint tort-feasors.[39]

This unjust result has long been recognized by attorneys defending joint tort-feasors and has also been addressed by courts encouraging the abolition of a "no contribution" scheme.[40]

(Okla. 1989)); OR. REV. STAT. § 18.445 (1991); 42 PA. CONS. STAT. ANN. § 7102 (1982 & Supp. 1993); R.I. GEN. LAWS § 10-6-3 (1985); S.D. CODIFIED LAWS ANN. § 15-8-15 (1984); TEX. CIV. PRAC. & REM. CODE ANN. § 33.003 (West Supp. 1993); UTAH CODE ANN. § 78-27-40 (1992); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1993); 1993 Wash. Legis. Serv. 496 (West) (amending WASH. REV. CODE ANN. § 4.22.070 (West 1988)); W. VA. CODE § 55-7-13 (1981) (as explained in Sitzes v. Anchor Motor Freight, Inc. 289 S.E.2d 679, 687-88 (W. Va. 1982)); WIS. STAT. ANN. § 895.045 (West 1983) (as explained in Peiffer v. Allstate Ins. Co., 187 N.W.2d 182, 184-85 (Wis. 1971)); WYO. STAT. § 1-1-109 (1988); McIntyre v. Balentine, 833 S.W.2d 52, 58 (Tenn. 1992) (judicially adopting fault allocation among joint tort-feasors).

The remaining states have maintained a prohibition against allocation by percentage of fault. *See* MASS GEN. LAWS ANN. ch. 730, § 2 (West 1986) (degree of fault not considered); S.C. CODE ANN. § 15-38-30 (Law. Co-op Supp. 1992) (degree of fault not considered); Virginia Gobble v. Bradford, 147 So. 619, 620 (Ala. 1933) (disallowing contribution); Lahocki v. Cantee Sand & Gravel Co., 398 A.2d 490, 513-14 (Md. 1979) (interpreting MD. ANN. CODE art. 50, § 20 (Supp. 1993) as requiring that fault be allocated by number of defendants, and not according to percentage of fault attributable to each), *rev'd on other grounds*, 410 A.2d 1039 (Md. 1980)); Lerwill v. Regent Van & Storage, Inc., 229 S.E.2d 880, 883-84 (Va. 1976) (adhering to doctrine of contributory negligence).

[38] *See* MISS. CODE ANN. § 85-5-5 (1972), *repealed by* 1989 Miss. Laws 311.

[39] *See, e.g.*, Wilson v. Giordano Ins. Agency, Inc., 475 So. 2d 414, 420 (Miss. 1985) (illustrating joint tort-feasor liability under MISS. CODE ANN. § 85-5-5 (1972)); Celotex Corp. v. Campbell Roofing & Metal Works, Inc., 352 So. 2d 1316, 1317 (Miss. 1977) (presenting example of plaintiff executing entire judgment against only one of two liable defendants); Board of County Comm'rs v. Ridenour, 623 P.2d 1174, 1186 (Wyo. 1981) (holding that entire award against only one tort-feasor is contrary to fairness sought through comparative negligence).

[40] Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 111 (1974) (holding that justice better served by allowing defendant to bear only his share of fault); *Wilson*, 475 So. 2d at 420 (Robertson, J., dissenting) (calling for abandonment of prohibition against contribution). *See generally* H. Richmond Culp, III, Comment, *Fair Appor-*

The potential for this obvious inequity in cases involving two or more tort-feasors is in large part remedied by the passage of section 85-5-7, which provides for several liability for joint tort-feasors except in specifically identified situations.[41] However, section 85-5-7, if not read carefully and not read as a whole, contains *facial* ambiguities.[42] Nevertheless, upon careful scrutiny of this statute, it is clear that any purported ambiguity is superficial, and that the Mississippi Legislature gave full effect to the equitable principles undergirding the concept of comparative fault[43] in adopting section 85-5-7.

B. *The Plain Language of the Statute Requires Apportionment of Fault to All Participants to the Occurrence*

1. *"Persons" Contemplates All Participants to the Occurrence*

Section 85-5-7 specifically concerns the determination of the percentage of fault[44] "for damages caused by two (2) or more *persons*."[45] Significantly, by using the all-inclusive term "persons," section 85-5-7 does not limit its application to cases in which the damage is caused by two or more "known" persons, nor two or more persons amenable to present liability for monetary damages.[46] Rather, section 85-5-7 expressly applies

---

tionment Among Joint Tortfeasors —A Mississippi Perspective, 55 MISS. L.J. 709, 716-18 (1985) (arguing that joint and several liability with limited contribution is scheme "with no teeth").

[41] *See supra* notes 12-13.

[42] For a complete text of MISS. CODE ANN. § 85-5-7 (1991), see *supra* note 12. *See generally* Williams, *supra* note 10.

[43] *See supra* notes 19-23 and accompanying text.

[44] The heading of § 85-5-7 provides: "Limitation of joint and several liability for damages caused by two or more persons; contribution between joint tortfeasors; *determination of percentage of fault.*" MISS. CODE ANN. § 85-5-7 (1991) (emphasis added).

[45] *See* MISS. CODE ANN. § 85-5-7(2)&(3) (1991) (emphasis added); *infra* note 46.

[46] Presently, tort-feasors who have settled with the injured party and have been released from any further liability are not amenable to liability for monetary damages. *See infra* notes 76-108 and accompanying text. Additionally, tort-feasors who are immune from liability, such as employers under a workers' compensation scheme, are

where damage has been caused by two or more persons, regardless of the plaintiff's ability to pursue a monetary judgment against each such person. The following example illustrates the extreme importance in recognizing the proper meaning of "persons" as employed by the Mississippi Legislature in section 85-5-7.

Suppose that P, a passenger in Driver A's car who is also A's spouse, is seriously injured when A swerves into a guardrail to avoid a collision with Driver B who negligently changed lanes in front of A's car. Further suppose that the jurisdiction in which the accident occurred recognizes interspousal tort immunity. The jury returns a verdict finding that A and B are each 50% responsible for P's injuries.

Assuming that "persons" as used in section 85-5-7 concerns only persons contributing to the injury who are amenable to present liability for monetary damages, section 85-5-7 would have no application in the hypothetical presented, as there would be only one person responsible for the damage from whom monetary damages could be recovered; A is immune from liability because of interspousal tort immunity. Under this erroneous construction of section 85-5-7, Driver B would be inequitably subjected to 100% liability for all damages caused by the concurrent negligence of himself and Driver A. Avoidance of such an inequitable result is one of the more obvious purposes of the Mississippi Legislature's adoption of several liability in section 85-5-7.[47]

Therefore, "persons" as employed in section 85-5-7 necessarily contemplates *all* participants to the occurrence who contributed in causing the damage regardless of the amenability of those persons to present liability. Not only is this the only

---

likewise not amenable to liability for monetary damages. *See infra* notes 109-191 and accompanying text.

[47] *See supra* note 21. The case from which the preceding hypothetical is derived is Fabre v. Marin, 623 So. 2d 1182, 1185-86 (Fla. 1993), In *Fabre*, the Florida Supreme Court ruled that "party" as used in Florida's comparative negligence statute required that fault be allocated to all participants to the occurrence, including immune parties, and liability assessed to the named defendant in direct proportion to that defendant's degree of fault. *Fabre*, 623 So. 2d at 1187.

logical construction of the Mississippi Legislature's use of the all-inclusive term "persons", but this construction is also consistent with other statutory schemes implementing comparative fault principles.[48]

2. *"Joint Tort-feasors" Includes Both Defendants and Absent Tort-Feasors*

The necessity that the negligence of *all* "joint tort-feasors"[49] be considered in the apportionment process, whether or not named as parties to the action by the plaintiff, is also clear from a logical construction of the plain language of section

---

[48] *See* ARIZ. REV. STAT. ANN. § 12-2506 (B) (Supp. 1993) ("In assessing percentage of fault the trier of fact shall consider the fault of all *persons* who contributed to the alleged injury, . . . regardless of whether the person was, or could have been, named as a party to the suit.") (emphasis added). COLO. REV. STAT. ANN. § 13-21-111.5(3)(a) (West 1986) similarly provides:

> [T]he finder of fact in a civil action may consider the degree or percentage of negligence or fault of a *person not a party to the action*, based upon evidence thereof, which shall be admissible, in determining the degree or percentage of negligence or fault of those persons who are parties to such action.

Id. (emphasis added). Additionally, LA. CODE CIV. PROC. ANN. art. 1812(C)(2)(b) (West 1990) states:

> C. In cases to recover damages for injury, . . . the court may submit to the jury special written questions inquiring as to:
>
> . . . .
>
> (2) If appropriate, whether another *person*, whether party or not, other than the person suffering injury, . . . was at fault, and, if so:
>
> . . . .
>
> (b) The degree of such fault, expressed in percentage.

Id. (emphasis added); *see also* OKLA. STAT. ANN. tit. 23, § 13 (West 1987) (providing that, in order to bar recovery, plaintiff's negligence must be "of greater degree than any negligence of the person, firm or corporation causing such damage"); Paul v. N.L. Indus., 624 P.2d 68, 69 (Okla. 1980) (stating that OKLA. STAT. ANN. tit. 23, § 13 (West 1987) "offers little help in finding a solution to the question of the absent tortfeasor. However, it does speak of the negligence of a 'person, firm or corporation causing such damage,' and not of 'parties' to a lawsuit.") (footnote omitted).

[49] *See generally* UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1, 12 U.L.A. 57 (1975) ("'[J]oint tortfeasors' means two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them."); *see also supra* note 10.

85-5-7. Subsection (3) specifically requires that "a joint tort-feasor shall be liable only for the amount of damages allocated to him *in direct proportion* to his percentage of fault."[50] Without considering the fault of *every* joint tort-feasor (*i.e.*, named parties and absent tort-feasors), it is impossible for the fact-finder to make a directly proportionate allocation of the plaintiff's damages as specifically required by the statute.[51] Again, therefore, it is clear that section 85-5-7 contemplates the consideration of the fault of *all* tort-feasors in the apportionment process.

This interpretation of "joint tort-feasors" is bolstered by subsection (4). When setting forth the rules of contribution, the Mississippi Legislature employed the use of both "joint tort-feasors" and "defendant", making apparent the Legislature's intent that each term be used to identify different classes of participants to the tortious occurrence. Accordingly, subsection (4) of section 85-5-7 provides: "Any *defendant* held jointly liable under this section shall have a right of contribution against fellow joint tort-feasors. A *defendant* shall be held responsible for contribution to other joint tort-feasors only for the percentage of fault assessed to *such defendant*."[52]

Significantly, while there is no legal obstacle to *fault* being allocated to absent tort-feasors, there cannot be a requirement of *contribution* from absent tort-feasors.[53] Thus, "defendant," indicating a named party to the suit,[54] is purposely employed in the provision on contribution rather than the phrase "joint tort-feasors". Had the Legislature intended that "joint tort-feasors", as used in subsection (3), identify only *parties to the suit* (from whom contribution would be available), there would be no need for the use of "defendant" in subsection (4). Therefore, subsection (3), by its own terms and by necessary implication, requires the allocation of fault among *all* participants to the occurrence.

---

[50] MISS. CODE ANN. § 85-5-7(3) (1991).

[51] *See supra* note 26 and accompanying text.

[52] MISS. CODE ANN. § 85-5-7(4) (1991) (emphasis added).

[53] *See* Entman, *supra* note 27, at 108. In this article, the author explained:

> Without joint and several liability, . . . a defendant has no claim for contribution against a non-joined tort-feasor and, consequently, no ground for asserting a third-party claim making the absentee a party to the suit. Given [Tennessee's] abolition of joint and several liability, the question then becomes what a defendant must do to have an absentee included in the factfinder's apportionment of fault.

Id.

[54] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.011(2) (West Supp. 1993) ("'Defendant' includes any party from whom a claimant seeks recovery of damages pursuant to the provisions of [the comparative negligence statute] at the time of the submission of the case to the trier of fact.").

3. *"Party" Includes Any Joint Tort-Feasor Alleged to be at Fault*

Subsection (7) of section 85-5-7 requires the trier of fact to determine the percentage of fault "for each *party* alleged to be at fault."[55] As is apparent from a logical reading of the statute, "party" as used in subsection (7) contemplates *all* participants to the occurrence rather than merely named party-defendants.

First, had the Legislature intended that "party" identify only named party-defendants, the Legislature would have specified "defendant" in subsection (7), just as it did in subsection (4).[56] This rationale was adopted as controlling by Florida which has a statute that similarly requires apportionment of each *party's* fault.[57] In *Fabre v. Marin*,[58] a passenger brought suit against the driver of another car, alleging that the defendant drove into the path of the car in which the plaintiff was riding.[59] The plaintiff could not sue the driver of the car in which she was a passenger because the driver was her husband,

---

[55] MISS. CODE ANN. § 85-5-7(7) (1991) (emphasis added).

[56] *See supra* notes 53-54 and accompanying text.

[57] *See* Fabre v. Marin, 623 So. 2d 1182, 1185 (Fla. 1993) (interpreting "party" as all entities who contributed to damage); Messmer v. Teacher's Ins. Co., 588 So. 2d 610, 611-12 (Fla. Dist. Ct. App. 1991) (holding that party's percentage of fault includes all participants to incident), *review denied*, 598 So. 2d 77 (Fla. 1992) ; *see also* DaFonte v. Up-Right, Inc., 828 P.2d 140, 145 (Cal. 1992) (stating that all entities' fault to be considered, and not just joined defendants).

[58] 623 So. 2d 1182 (Fla. 1993).

[59] *Fabre*, 623 So. 2d at 1183.

and Florida, at that time, had spousal immunity.[60] The trial court denied the defendant's request that the jury be permitted to allocate fault to the plaintiff's husband in order to reduce any judgment.[61] However, in case the court was later reversed, the trial court allowed the jury to assess fault to the plaintiff's husband, but did not reduce the award proportionately.[62] On appeal, the Florida Supreme Court held that the statute[63] requiring allocation of fault between *parties* unambiguously mandated that "the only means of determining a party's percentage of fault is to compare that party's percentage to all of the other entities who contributed to the accident, regardless of whether they have been or could have been joined as defendants."[64] Accordingly, the judgment was reduced by the percentage of the husband's allocated fault.[65] The trial court in *Messmer v. Teacher's Ins. Co.*[66] had ruled similarly two years earlier when it held:

> The use of the word 'party' simply describes an entity against whom judgment is to be entered and is not intended as a word of limitation. Had the legislature intended the apportionment computation to be limited to the combined negligence of those who happened to be parties to the proceeding, it would have so stated.[67]

Additionally, section 85-5-7, subsection (7) of the Mississippi Code specifically applies to "actions involving *joint tort-feasors*."[68] As previously discussed, the phrase "joint tort-feasors" as used in section 85-5-7 includes *all* participants to the occurrence.[69] It is therefore illogical to limit the fact-finder's allocation of fault under subsection (7) to only named party-defendants when there may be other joint tort-feasors not named by the plaintiff as defendants.[70] Indeed, if "party" as used in subsection (7) was intended to include only named party-defendants, there would be no purpose for the provision "in actions involving *joint tort-feasors*"[71] in cases where the plaintiff has named only one of several joint tort-feasors as a party-defendant.

---

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] FLA. STAT. ANN. § 768.81(3) (West Supp. 1993).

[64] *Fabre*, 623 So. 2d at 1185.

[65] *Id.* at 1187.

[66] 588 So. 2d 610 (Fla. Dist. Ct. App. 1991).

[67] *Fabre,* 623 So. 2d at 1184 (quoting *Messmer's* trial court order).

[68] MISS. CODE ANN. § 85-5-7(7) (1991). For various definitions of "joint tort-feasors," see *supra* note 10.

[69] *See supra* notes 49-54 and accompanying text.

In sum, the Legislature did not limit the applicability of subsection (7) to only actions involving joint party-*defendants*.[72] Rather, the Legislature made subsection (7) specifically applicable to *any* action involving *"joint tort-feasors."*[73] Therefore, it is clear from a logical reading of the entire statute that the fact-finder is to determine the percentage of fault for each participant alleged to be at fault,[74] regardless of whether

---

[70] *See, e.g.*, Connar v. West Shore Equip., 227 N.W.2d 660, 662 (Wis. 1975). In *Connar*, the court stated:

> [W]hen apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction, *whether or not they be parties to the lawsuit* and whether or not they can be liable to the plaintiff or to the other tort-feasors either by operation of law or because of a prior release.

Id.; *see also* Gaither v. City of Tulsa, 664 P.2d 1026, 1029 (Okla. 1983) ("There is no requirement that one be a party to the lawsuit before his negligence may be considered by the jury in the negligence calculations.").

[71] MISS. CODE ANN. § 85-5-7(7) (1991) (emphasis added).

[72] If "party" as used in subsection (7) were intended to include only named parties to the action, it is suggested, in light of the specification of "defendant" in subsection (4), that the Legislature would have employed more specific language in subsection (7). Not only might the Legislature have simply used "defendant" in subsection (7) just as in subsection (4), but also the Mississippi Legislature, as in other jurisdictions, might have specified a determination of the percentage of fault "for each party from whom the plaintiff seeks recovery" or "for each party from whom recovery is sought" rather than "for each party alleged to be at fault." *See, e.g.*, OHIO REV. CODE ANN. § 2315.19(4) (Baldwin 1990) (providing that, where contributory negligence is established as affirmative defense, special interrogatories shall be answered specifying "the percentage of negligence . . . that is attributable *to each party to the action from whom the complainant seeks recovery*") (emphasis added); Eberly v. A-P Controls, Inc., 572 N.E.2d 633, 638 (Ohio 1991) (holding that apportionment of negligence to absent tort-feasors not allowed); *see also* OR. REV. STAT. § 18.480(1)(b) (1988) (providing that, under comparative negligence scheme, trier of fact may be requested to answer special interrogatories indicating "[t]he degree of each party's fault expressed as a percentage of the total fault attributable to all parties *represented in the action*") (emphasis added); Mills v. Brown, 735 P.2d 603, 605 (Or. 1987) ("The statutory scheme of comparative fault restricts the . . . fact-finder to consideration only of the fault of the parties before the court at the time the case is submitted to the fact-finder . . . .").

---

[73] *See supra* notes 51, 55-56, 68-71 and accompanying text.

[74] Subsection (7) specifically limits allocation of fault to "each party *alleged to be at fault.*" MISS. CODE ANN. § 85-5-7(7) (1991). Therefore, if there are absent tort-feasors whose negligence should be considered in the apportionment process, the named party-defendant must raise this issue as an affirmative defense. *See, e.g.*, O'Gilvie v. International Playtex, Inc., 821 F.2d 1438, 1445 (10th Cir. 1987) ("The defense that a phantom party contributed to a plaintiff's injury is in the nature of an avoidance, and normally would be required . . . to be pleaded affirmatively in the answer.") (citation omitted). *See generally* Entman, *supra* note 27 (discussing procedural aspects of pleading and proving fault of absent tort-feasor); Stephen B. White & David L. Abney, *Phantom Nonparties At Fault*, ARIZONA ATTORNEY 15 (June 1992) (discussing specificity of notice requirement to designate phantom party). *But see* McCardle v. Regional Valve Corp., CA2:93CV338 (S.D. Miss.) (August 18, 1994) (Order) (ordering plaintiff must give notice to immune employer tort-feasor that employer's negligence will be considered by jury in special verdict so that employer may determine whether to join in action under permissive joinder rule).

Asserting the negligence of an absent tort-feasor as an affirmative defense also provides the plaintiff an opportunity to add the absent tort-feasor as a named party-defendant assuming the absent tort-feasor is known and not otherwise immune to liability. *See, e.g.*, McIntyre v. Balentine, 833 S.W.2d 52, 58 (Tenn. 1992) ("[I]n order for a plaintiff to recover a judgment against [an absent tort-feasor whose negligence is raised as an affirmative defense], the plaintiff must have made a timely amendment to his complaint and caused process to be served on such additional person."). At least one jurisdiction has statutorily adopted guidelines concerning the timeliness of raising an absent tort-feasor defense to avoid the perceived "potential for abuse by defendants who might delay in identifying a non-party to the obvious prejudice of plaintiffs . . . ." Huber v. Henley, 656 F. Supp. 508, 510 (S.D. Ind. 1987). IND. CODE ANN. § 34-4-33-10(c) (Burns Supp. 1993) provides:

> (c) A nonparty defense that is known by the defendant when he files his first answer shall be pleaded as a part of the first answer. A defendant who gains actual knowledge of a nonparty defense after the filing of an answer may plead the defense with reasonable promptness. However, if the defendant was served with a complaint and summons more than one hundred fifty (150) days before the expiration of the limitation of action applicable to the claimant's claim against the nonparty, the defendant shall plead any nonparty defense not later than forty-five (45) days before the expiration of that limitation of action. The trial court may alter these time limitations or make other suitable time limitations in any manner that is consistent with:
>
> > (1) giving the defendant a reasonable opportunity to discover the existence of a nonparty defense; and
> >
> > (2) giving the claimant a reasonable opportunity to add the nonparty as an additional defendant to the action before the expira-

the plaintiff chose to join the party as a named party-defendant in the suit.[75]

---

tion of the period of limitation applicable to the claim.

As with any affirmative defense, the burden is on the named party-defendant to establish the negligence of the absent tort-feasor and to prove the proper apportionment where there is no direct evidence of the percentages of fault attributable to each party. *See* Haney v. Francewar, 588 So. 2d 1172, 1178 (La. Ct. App. 1991) ("[W]here non-parties are claimed to be at fault in causing damages, the burden shifts to the defendants to show not only the fault of the non-parties (or phantoms), but the percentage thereof."). Several jurisdictions have statutorily adopted this rule. *See, e.g.*, IND. CODE ANN. § 34-4-33-10(b) (Burns Supp. 1993) ("The burden of proof of a nonparty defense is upon the defendant, who must affirmatively plead the defense."). N.M. STAT. ANN. § 41-3A-1(B) (Michie 1987), for example, provides:

> In causes of action to which several liability applies, any defendant who establishes that the fault of another is a proximate cause of a plaintiff's injury shall be liable only for that portion of the total dollar amount awarded as damages to the plaintiff that is equal to the ratio of such defendant's fault to the total fault attributed to all persons, including plaintiffs, defendants and persons not party to the action.

But see Entman, *supra* note 27, at 111-13 (explaining that burden of persuasion as to fault of absent tort-feasor is not necessarily upon defendant; plaintiff may be required to prove that absent tort-feasor did not proximately contribute to plaintiff's injuries).

[75] At least one jurisdiction has arrived at this same conclusion following consideration of the use of the word "party" in its comparative negligence statute, although based on an entirely different interpretation of "party". *See* Pocatello Indus. Park Co. v. Steel West, Inc., 621 P.2d 399, 403 n.4 (Idaho 1980). In *Pocatello*, the court stated:

> [The plaintiff] contends that the reference to the term "party" in our comparative negligence statute implies that only parties may be included in the special verdict: "6-802. VERDICT GIVING PERCENTAGE OF NEGLIGENCE ATTRIBUTABLE TO EACH PARTY. The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence attributable to each party; and the court shall then reduce the amount of such damages in proportion to the amount of negligence attributable to the person recovering." *While the statute requires that parties be included in the special verdict, it does not state that only parties shall be included.*

Id. (citation omitted) (emphasis added).

C. *The Fault of Settling Parties Must Be Considered in the Apportionment Process*

1. *Allocation of Fault to Settling Parties Is Required by Mississippi's Comparative Fault Statute*

In order to allocate fault to named party-defendants in direct proportion to each defendant's percentage of fault as required by section 85-5-7,[76] the fault of all participants to the occurrence must be considered by the trier of fact.[77] This section of this Article considers the effect on this principle of direct apportionment when a named party-defendant is released prior to trial pursuant to a settlement agreement entered into with the plaintiff.[78]

As discussed in an earlier section, "party" as used in Mississippi's comparative negligence statute includes *all* participants to the occurrence.[79] Therefore, the mere fact that a participant to the occurrence has settled with the plaintiff and has been released from further liability for that participant's negligent conduct does not remove consideration of that participant's percentage of fault from the apportionment process required by section 85-5-7.[80] Indeed, allowing a plaintiff's settlement with a released party-defendant to prevent consideration of the named party's percentage of fault in the apportionment process would be inimical to the equitable principles underlying the adoption and recent refinement of comparative fault in Mississippi.[81]

---

[76] MISS. CODE ANN. § 85-5-7(3) (1991).

[77] *See supra* notes 33-76 and accompanying text.

[78] A majority of jurisdictions which require allocation of fault allow consideration of the settling tort-feasor's percentage of fault. *See* ALASKA STAT. § 09.17.080 (Supp. 1993); ARIZ. REV. STAT. ANN. § 12-2506 (Supp. 1993); COLO. REV. STAT. ANN. § 13-21-111.5 (West Supp. 1993); CONN. GEN. STAT. ANN. § 52-572h (West 1991); IOWA CODE ANN. § 668.3 (West 1987); KY. REV. STAT. ANN. § 411.182(2)&(4) (Baldwin 1991); MONT. CODE ANN. § 27-1-703 (1993); NEB. REV. STAT. § 25-21,185.11 (Supp. 1992); N.M. STAT. ANN. § 41-3A-1 (Michie 1978); 1993 Wash. Legis. Serv. 496 (West) (amending WASH. REV. CODE ANN. § 4.22.070 (West 1988)); Kathios v. General Motors Corp., 862 F.2d 944, 949-50 (1st Cir. 1988) (interpreting New Hampshire's comparative negligence law); Bordelon v. Consolidated Georex Geophysics, 628 F. Supp. 810, 813 (W.D. La. 1986); Young v. Verson Allsteel Press Co., 524 F. Supp. 1147, 1152 (E.D. Pa. 1981); Conkright v. Ballantyne of Omaha, Inc., 496 F. Supp. 147, 152 (W.D. Mich. 1980); Stacey v. Bangor Punta Corp., 108 F.R.D. 72, 76 (D. Me. 1985); Bracket v. California, 226 Cal. Rptr. 1, 1-2 (Cal. Ct. App. 1986); Lasselle v. Special Prod. Co., 677 P.2d 483, 485 (Idaho 1983); Brown v. Keill, 580 P.2d 867, 875-76 (Kan. 1978); Frey v. Snelgrove, 269 N.W.2d 918, 922 (Minn. 1978); Young v. Latta, 559 A.2d 465, 467-68 (N.J. Super. Ct. App. Div. 1989), *aff'd*, 589 A.2d 1020 (N.J. 1991); Penzell v. New York, 466 N.Y.S.2d 562, 568 (N.Y. Ct. Cl. 1983); Bartels v. City of Williston, 276 N.W.2d 113, 119 (N.D. 1979); Paul v. N.L. Indus., 624 P.2d 68, 69 (Okla. 1980); Freeman v. Berg, 482 N.W.2d 32, 33 (S.D. 1992); Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 429 (Tex. 1984); Bowman v. Barnes, 282 S.E.2d 613, 620-21 (W. Va. 1981); Pierringer v. Hoger, 124 N.W.2d 106, 112 (Wis. 1963); Board of County Comm'rs v. Ridenour, 623 P.2d 1174, 1189 (Wyo. 1981).

[79] *See supra* notes 55-75 and accompanying text.

A number of jurisdictions have interpreted "party" as used in comparative fault statutes to include settling or released tortfeasors. For example, Minnesota and North Dakota have interpreted "party" as used in their respective comparative fault statutes[82] to include settling defendants within their scope. In *Frey v. Snelgrove*,[83] the Minnesota Supreme Court stated:

---

[80] For example, in Connar v. West Shore Equip. of Milwaukee, Inc., 227 N.W.2d 660 (Wis. 1975), the court stated:

> [W]hen apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tort-feasors either by operation of law or *because of a prior release*.

Id. at 662 (emphasis added).

[81] *See supra* notes 19-29 and accompanying text. In Kathios v. General Motors Corp., 862 F.2d 944 (1st Cir. 1988), the court stated:

> If . . . a plaintiff's negligence is to be calculated only in relation to that of the particular respondent(s) whom he elects to sue, then a plaintiff who was, say, 10% negligent, could sue a defendant who was likewise 10% negligent and recover 50% of his damages. . . . As a leading text recognizes, "failure to consider the negligence of all tortfeasors, whether parties or not, prejudices the joined defendants who are thus required to bear a greater portion of the plaintiff's loss than is attributable to their fault." That outcome strikes us as antithetic to the objective of New Hampshire's comparative negligence statute, which is "to allocate more equitably the responsibility for injuries due to negligent conduct on the part of parties on both sides of a lawsuit."

Id. at 950-51 (citations omitted).

> In almost every case the trial court should submit to the jury the fault of all parties, *including the settling defendants*, even though they have been dismissed from the lawsuit. If there is "evidence of conduct which, if believed by the jury, would constitute negligence (or fault) on the part of the person . . . inquired about," the fault or negligence of that party should be submitted to the jury.[84]

In addition to recognizing the necessity that the fault of settling parties be considered in the apportionment process, the Supreme Court of North Dakota also recognized that allowing consideration of the fault of settling defendants would in no way prejudice the rights of settling defendants:

> The issue between the plaintiff and the nonsettling defendant . . . is the percentage of causal negligence, if any, of the nonsettling defendant, but such percentage of negligence can only be determined by a proper allocation of all the causal negligence, if any, of all the joint tort-feasors and of the plaintiff if contributory negligence is involved. The determination of this issue between the plaintiff and the nonsettling defendant does not require the settling defendants to remain parties because the allocation, if any, of the causal negligence to the settling tortfeasors is merely a part of the mechanics by which the percentage of causal negligence of the nonsettling

---

[82] The comparative fault statutes of Minnesota and North Dakota are practically identical. MINN. STAT. ANN. § 604.01(1) (West Supp. 1993), provides in relevant part:

> The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and *the percentage of fault attributable to each party* and the court shall then reduce the amount of damages in proportion to the amount of fault attributable to the person recovering.

Id. (emphasis added). N.D. CENT. CODE § 9-10-07 (1987), provides in relevant part:

> The court may, and when requested by either party shall, direct the jury to find separate special verdicts determining the amount of damages and *the percentage of negligence attributable to each party*; and the court shall then reduce the amount of such damages in proportion to the amount of negligence attributable to the person recovering.

Id. (emphasis added).

[83] 269 N.W.2d 918 (Minn. 1978).

[84] *Frey*, 269 N.W.2d at 923 (citation omitted) (emphasis added).

> tort-feasor is determined. It makes no practical difference to the settling tort-feasors what percentage of causal negligence is allocated to them because they have bought their peace in any event.[85]

The provisions in the comparative fault statutes of both Kentucky and South Dakota concerning the determination of percentages of fault[86] also include settling or released persons within the scope of "party" as used in those provisions.[87] In *Floyd v. Carlisle Construction Co., Inc.*,[88] the Court specifically ruled that "[a] tortfeasor who is not actually a defendant is construed to be one for purposes of apportionment if he has settled the claim against him . . . ."[89]

The recognition that settling or released parties are included within the scope of "party" is consistent with the Mississippi Legislature's express statement that "a joint tort-feasor shall be liable only for the amount of damages allocated to him *in direct proportion* to his percentage of fault."[90] Only by allowing the fact-finder to consider the negligent conduct of settling or released parties can a true allocation of fault be achieved consistent with this purpose. Therefore, to effectuate the clearly expressed purpose of the Legislature in adopting section 85-5-7, dismissal of a named party-defendant pursuant to a settlement agreement should have no effect on the apportionment process required by section 85-5-7.

---

[85] Bartels v. City of Williston, 276 N.W.2d 113, 119 (N.D. 1979) (quoting Bielski v. Schulze, 114 N.W.2d 105, 111-12 (Wis. 1962)).

[86] The pertinent provisions in both the Kentucky and South Dakota statutes state in relevant part, "In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed." KY. REV. STAT. ANN. § 411.182 (Baldwin 1993); S.D. CODIFIED LAWS ANN. § 15-8-15.2 (Supp. 1993).

[87] *See* Freeman v. Berg, 482 N.W.2d 32, 33 (S.D. 1992) (holding that settling party remain named defendant at trial for purposes of apportionment).

[88] 758 S.W.2d 430 (Ky. 1988).

[89] *Floyd*, 758 S.W.2d at 432.

[90] MISS. CODE ANN. § 85-5-7(3) (1991) (emphasis added); *see supra* notes 55-75 and accompanying text.

2. *Effect of Allocating Fault to Settling Parties*

Following an allocation of fault to settling parties, the issue remains as to the effect of this allocation on the ultimate liability of the non-settling tort-feasors.[91] The generally-recognized law in Mississippi is that a named party-defendant's liability is to be reduced by the *amount* of any settlement(s) entered into with the plaintiff.[92] This rule of credit is designed to ensure that the plaintiff does not obtain double recovery for the same damages,[93] and is not a rule of allocation of liability among tort-feasors. The four case scenarios which follow illustrate the various situations in which this issue arises, and suggest that a true rule of proportionality, consistent with several liability mandated by section 85-5-7, can be equitably applied in each situation.

Case #1 illustrates the "perfect world" scenario. In Case #1, P sues T1, T2, and T3 for negligence and settles with T1 for $50,000 prior to trial. The jury subsequently enters a verdict in favor of P in the amount of $100,000 and finds that the tort-feasors are responsible for this damage in the following percentages: T1=50%; T2=30%; and T3=20%. T1, having settled with P, is no longer subject to liability, and T2 and T3 are liable to P for $30,000 and $20,000, respectively. Thus, as a result of the fact-finder's apportionment of fault and a credit for T1's settlement, the plaintiff is fully compensated, and each tort-feasor is liable only for the damages attributable to his proportionate share of fault.[94]

---

[91] *See generally* Williams, *supra* note 10, at 156-58.

[92] *See* Williams, *supra* note 10, at 157 (explaining that in considering effect of release or covenant not to sue on non-settling tort-feasors, Mississippi has adopted approach which allows non-settling tort-feasors credit for amount of consideration paid for release) (footnotes omitted); *see also* Hunnicutt v. Wright, 986 F.2d 119, 124-25 (5th Cir. 1993) (holding that, in Mississippi, non-settling tort-feasor is entitled to credit for any amounts already recovered by plaintiff). *See generally McDermott*, 62 U.S.L.W. at 4243 ("It is generally agreed that when a plaintiff settles with one of several joint tortfeasors, the nonsettling defendants are entitled to a credit for that settlement.").

[93] *See Hunnicutt*, 986 F.2d at 124 (quoting JOHNNY C. PARKER, MISSISSIPPI LAW OF DAMAGES § 17-10, at 236 (1990)) ("There can be no double recovery of the amount of damages which one has sustained. Consequently, the party injured may release or settle with one joint tortfeasor or joint contract debtor and then sue the other, who is entitled to be given credit for the amount already recovered.").

A perfect world, however, this is not. Assume in Case #2 that P sues T1, T2, and T3 for damages arising out of the alleged concurring negligent acts of each. Prior to trial, P settles with T1 for $10,000. Following trial, a verdict is entered in favor of P in the amount of $100,000, and the following percentages of fault are allocated to each tort-feasor: T1=50%; T2=30%; and T3=20%. As in Case #1, T2 and T3, consistent with the purposes of section 85-5-7, are liable for $30,000 and $20,000, respectively (*i.e.*, the amount of damages in direct proportion to their respective shares of fault). In Case #2, however, P has struck a bad deal with T1 in settling for $10,000, as T1 was actually 50% responsible for P's damages. This bad decision by P results in P falling $40,000 short of full compensation for damages awarded at trial. There is no principled reason, however, that T2 and T3 should be forced to pay more than their proportionate share as a result of P's poor assessment of its case against T1.[95] As recently recognized by the United States Supreme Court, "In such cases, the plaintiff's recovery against the settling defendant has been limited not by outside forces, but by its own agreement to settle. There is no reason to allocate any shortfall to the other defendants, who were not parties to the settlement."[96]

---

[94] *See* Fabre v. Marin, 623 So. 2d 1182, 1186 n.3 (Fla. 1993) (presenting examples of effect of settlement and allocation).

[95] In this regard, the argument is often raised that T2 and T3 should bear a proportionate share of the amount required to fully compensate P as a result of P's bad deal with T1. The rationale behind this argument being that, as between P and T2 and T3, T2 and T3, as the wrongdoers, should bear any additional losses. *Cf.* Williams, *supra* note 10, at 162 (suggesting that non-settling tort-feasor should bear amount of uncollectible share where plaintiff is "totally free from fault") (footnotes omitted).

In response to this argument in the settlement context, it is noted that, as between P, T2, and T3, P is in the best position to avoid this loss in its settlement negotiations with T1. Therefore, P should be responsible for the entire loss resulting from its own unwise settlement decision, regardless of the degree of P's own fault in causing the damages.

[96] *McDermott*, 62 U.S.L.W. at 4247.

Additionally, and more importantly, requiring T2 and T3 to "pick up the tab" for P's unwise settlement decision would be in direct contravention of section 85-5-7(3), which specifically states that "a joint tort-feasor shall be liable only for the amount of damages allocated to him *in direct proportion* to his percentage of fault."[97] Had P made a proper assessment of its case against T1, P should have refused to settle with T1 for any amount less than $50,000. If T1 refused to accept P's settlement offer of $50,000, T1, after incurring the additional expense of trial, would then be subject to the jury's verdict finding T1 50% responsible. In either case, T2 and T3 had absolutely no influence over the faulty decision-making processes of P and/or T1, and it would be inherently unfair to punish either as a result.

Case #3 is unique to Mississippi because of the joint and several liability requirement allowing the plaintiff to recover at least 50% of the recoverable damages.[98] Assume T1 settles for $10,000 and the jury returns a verdict for $100,000 finding the percentages of fault as follows: T1=70%, T2=15% and T3=15%. In order for the plaintiff to recover 50% of his damages as required by statute, T2 and T3 would be jointly and severally liable for $50,000 (50% of $100,000) in direct proportion to their percentages of fault.[99] The plaintiff would have a short-fall of $40,000 ($100,000 - $50,000 + 10,000), but this again is a result of P's own poor assessment of the percentage of fault attributable to T1. T2 and T3 are not liable for more than 50% of the damages and, thus, would not be required to pay more than the statutory "safety net" of 50%.

Case #4 presents a special situation which arises when the settling tort-feasor pays the plaintiff a *greater* amount in settlement than would be attributable to the settling tort-feasor's percentage of fault.[100] Assume in Case #4 that P again files suit against T1, T2, and T3, and subsequently settles its claim against T1 for $30,000 prior to trial. A verdict is later entered in favor of P in the amount of $100,000, and the fact-finder apportions fault for P's damages in the following percentages: T1=10%; T2=50%; and T3=40%. In this case, should T2 and T3 be held liable for their respective shares of the *total* judgment, i.e., $50,000 and $40,000 respectively, P, having already received $30,000 from T1, would receive a total of $120,000 ($20,000 in excess of the total damages to which the fact-finder has found P entitled), and would thereby be overcompensated.

---

[97] MISS. CODE ANN. § 85-5-7(3) (1991) (emphasis added).

[98] MISS. CODE ANN. § 85-5-7 (1991).

[99] Assuming in Case #3 that T2 was found 20% at fault and T3 10% at fault, P could recover $33,333.33 from T2 and $16,666.67 from T3. *See infra* note 104 and accompanying text.

In this situation, the plaintiff, for a number of reasons, will argue that the amount of T1's settlement should not reduce the amount recoverable from T2 and T3 for their proportionate shares of the total liability. To begin, P might point to the inequity which would result if T2 and T3 are not required to atone for P's poor settlement decision in Case #3 above, but are allowed to reap the benefits of P's successful settlement negotiations in Case #4. Secondly, P might argue that, although the law of torts focuses on compensation,[101] "[t]he law contains no rigid rule against overcompensation."[102] This principle was recently recognized by the United States Supreme Court in *McDermott, Inc. v. AmClyde*[103] in which the Court stated:

---

[100] *See Fabre,* 623 So. 2d at 1186 n.3 (examining situation where settling tort-feasor pays more than his allocated fault).

[101] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 6 (5th ed. 1984). In this treatise, the authors explained:

> The law of torts . . . is concerned with the allocation of losses arising out of human activities . . . . "Arising out of the various and ever-increasing clashes of the activities of persons living in a common society, carrying on business in competition with fellow members of that society, owning property whch (sic) may in any of a thousand ways affect the persons or property of others—in short, doing all the things that constitute modern living—there must of necessity be losses, or injuries of many kinds sustained as a result of the activities of others. *The purpose of the law of torts is to adjust these losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another.*"

Id. (emphasis added) (quoting Cecil A. Wright, *Introduction to the Law of Torts*, 8 CAMB. L.J. 238, 238 (1944)).

> It seems to us that a plaintiff's good fortune in striking a favorable bargain with one defendant gives other defendants no claim to pay less than their proportionate share of the total loss. In fact, one of the virtues of the proportionate share rule is that . . . it does not make a litigating defendant's liability dependent on the amount of a settlement negotiated by others without regard to its interests.[104]

Finally, in support of its entitlement to full recovery from T2 and T3 in their respective proportionate shares, P might argue that only by requiring T2 and T3 to pay an amount exactly proportionate to their respective shares of liability can the court give full effect to the Mississippi Legislature's apparent intent in adopting section 85-5-7.[105]

Conversely, T2 and T3, the non-settling tort-feasors, also have forceful arguments in support of limiting their liability to only a proportionate share of the remaining, unsatisfied judgment after subtraction of the amount of T1's settlement payment from the total judgment. Initially, only by reducing the total judgment by the amount of T1's settlement prior to determining the proportionate amounts due P from T2 and T3 can effect be given to Mississippi's existing law requiring that a judgment be credited with the amount of any settlement proceeds.[106] Secondly, it must be recognized that the overcompensation which would inure to P if the settlement proceeds are not credited against the judgment would provide a profit to P, a result which is antithetical to a tort system based on "compensation."[107]

---

[102] *McDermott*, 62 U.S.L.W. at 4246.

[103] 62 U.S.L.W. 4241 (1994).

[104] *McDermott*, 62 U.S.L.W. at 4246.

[105] *See supra* notes 19-32 and accompanying text.

[106] *See supra* note 92.

[107] *See supra* note 101; *see also* Hunnicutt v. Wright, 986 F.2d 119, 124 (5th Cir. 1993) ("In computation of damages, a person is to be made whole, or complete satisfaction is to be made, or he is to receive the value of the property destroyed; it is never contemplated that the injured party should realize a profit from the damages

Therefore, both plaintiffs and non-settling tort-feasors have legitimate arguments in their favor where the settling tort-feasor pays a larger settlement amount than attributable to its proportionate fault. However, only the non-settling tort-feasors' position is consistent with existing Mississippi law. Nevertheless, regardless of the course which the Mississippi Supreme Court decides to take in the unique situation illustrated by Case #4,[108] it is clear that, in all other cases (Cases 1-3), non-settling tort-feasors must be required to pay *only* their proportionate share of the total judgment, regardless of the plaintiff's settlement with the settling tort-feasors. Only by adhering to this rule of direct proportionality can true and full effect be given to the Mississippi Legislature's recent refinement of joint and several liability in its passage of section 85-5-7.

D. *The Immune Employer*

As discussed earlier in this Article,[109] the underlying purpose behind allocation of fault between joint tort-feasors is to hold each tort-feasor severally liable only for that percentage of fault for which he was found to be negligent, with the exception of joint and several liability for up to 50% of the plaintiff's recoverable damages.[110] In order to accomplish this more equitable distribution of fault, the named joint tort-feasor is not to be penalized simply because the plaintiff chose not to sue all joint tort-feasors.[111] Similarly, the named joint tort-feasor should not be penalized because the plaintiff may be statutorily barred from suing the remaining joint tort-feasor(s). This

---

sustained" (quoting Mississippi Power & Light Co. v. Harrison, 152 So. 2d 892, 903 (Miss. 1963)).

[108] The authors do not suggest that the Mississippi Supreme Court is not bound to follow applicable decisions of the United States Supreme Court. However, it must be noted that *McDermott* is an admiralty case decided by the Court under principles of maritime law. *McDermott*, 62 U.S.L.W. at 4242.

[109] *See supra* notes 4-18 and accompanying text.

[110] MISS. CODE ANN. § 85-5-7(2) (1991).

[111] *See supra* notes 19-23 and accompanying text.

section concerns pursuing the goals of fairness and equitable distribution of fault found in comparative negligence and allocation of fault in the employee/employer situation.

Mississippi has established an exclusive compensation remedy available to employees against their employers as set forth in the Mississippi's Workers' Compensation Act.[112] The Act provides that the employer is liable only for workers' compensation benefits and that this *liability* is exclusive. In connection with the employee's prohibition against suing his employer, case law has likewise provided pre- and post- section 85-5-7 interpretations that an employer cannot be joined as a defendant for *contribution* purposes.[113]

Only one case, however, has attempted to deal with the immune employer under section 85-5-7 of the Mississippi Code where the defendant was not seeking contribution or a judgment of liability, but only allocation. In *White v. Esmark Apparel, Inc.*,[114] the defendant requested the court to join the plaintiff's employer, the City of Grenada, as a "phantom party" to enable the jury to allocate the fault (not liability or contribution) of all negligent participants, if any, as mandated by section 85-5-7.[115] In analyzing the motion, the court noted that whether the employer's fault could be considered in order to allocate fault under section 85-5-7 had never been addressed by a Mississippi court, nor had the United States Court of Appeals for the Fifth Circuit addressed the phantom party concept.[116] However, despite the *White* court's comment to the contrary,[117] a significant number of jurisdictions that provide for allocation of fault also allow the employer's fault to be proportioned, although the designation "phantom party" is not always used.[118] The defendant in *White* filed its motion to

---

[112] MISS. CODE ANN. §§ 71-3-1 to -13 (1989 & Supp. 1993).

[113] *See* Stringfellow v. Reed, 739 F. Supp. 324, 326 (S.D. Miss. 1990) (holding contribution cannot be compelled against employer pursuant to MISS. CODE ANN. § 85-5-7 (1991)); McClellan v. Poole, 692 F. Supp. 687, 689 (S.D. Miss. 1988) (holding that employer cannot be compelled to contribute under MISS. CODE ANN. § 85-5-5 (1972)).

[114] 788 F. Supp. 907 (N.D. Miss. 1992).

[115] *White*, 788 F. Supp. at 907. The plaintiff alleged that he was injured when he was exposed to toxic substances discharged by the defendant into the city sewer system. *Id.* The defendant denied liability and sought to join the City of Grenada "not as an 'actual named defendant,' but as a phantom party. . . ." *Id.*

[116] *Id.* at 909. Since then, United States District Judge Pickering ruled in favor of allocation of an employer's fault. McCardle v. Regional Valve Corp., CA 2:93CV338 (S.D. Miss.) (August 18, 1994) (Order). Although concurring with *White's* holding that the employer should not be joined, Judge Pickering ordered that the jury be allowed to

---

allocate the employer's fault and that allocation be handled through a special verdict or interrogatory. Judge Pickering also ordered that the employer be given notice of his ruling.

The Fifth Circuit addressed the issue applying Texas law in Bradshaw v. Freightliner Corp., 937 F.2d 197 (5th Cir. 1991), finding that although Texas law was unclear, the court would hold that the employer's fault could not be considered. However, in October, 1993, the Supreme Court of Texas found that the employer's negligence could be considered when allocating fault. Dresser Indus., Inc. v. Lee, 1993 WL 433292 at *1 (Tex. 1993). Also, in Nance v. Gulf Oil Corp., 817 F.2d 1176 (5th Cir. 1987), the court applied Louisiana law and found that the employer's fault had to be considered. *Id.* at 1180-81. Likewise, the court in Washington v. Department of Transp., 8 F.3d 296 (5th Cir. 1993), reached the same conclusion when applying Louisiana law. *Id.* at 299.

[117] *White*, 788 F. Supp. at 909 n.4. The court commented that only the United States Court of Appeals for the Eighth and Tenth Circuits, and Kansas and Oklahoma allowed phantom parties. *Id.* at 908. However, other jurisdictions allow the employer's fault to be considered, although not designated as a phantom. *See supra* note 35 and accompanying text. Other jurisdictions have addressed the issue after the briefs were submitted in *White* (January, 1991), and have permitted the employer's fault to be considered. *See infra* note 116.

[118] *See, e.g.*, Washington v. Department of Transportation, 8 F.3d 296, 299 (5th Cir. 1993) (applying Louisiana law, court ruled that evidence of statutorily-immune employer's fault must be admitted in employee's injury action against third-party tortfeasor); Gormly v. I. Lazar & Sons, Inc., 926 F.2d 47, 48 (1st Cir. 1991) (applying law of Rhode Island, court allowed employer's fault to be considered); Chaney v. Falling Creek Metal Prod., Inc., 906 F.2d 1304, 1308 n.7 (8th Cir. 1990) (utilizing "phantom party" to allocate fault to employer); Nance v. Gulf Oil Corp., 817 F.2d 1187, 1181 (5th Cir. 1987) (reversing lower court verdict on ground that employer's fault not allowed to be considered by jury); Rabatin v. Columbus Lines, Inc., 790 F.2d 22, 26 (3d Cir. 1986) (holding that fault of employer to be considered entitling joint tort-feasor to contribution); Prince v. Leesona Corp., 720 F.2d 1166, 1171 (10th Cir. 1983) (holding employer to be "phantom party" and thus allowing employer's fault to be considered); Hardin v. Manitowoc-Forsythe Corp., 691 F.2d 449, 454 (10th Cir. 1982) (assessing fault of plaintiff, employer, and defendant tort-feasor); Chamberlain v. Arborundum Co., 485 F.2d 31, 34 (3d Cir. 1973) (allowing allocation of employer's fault); Gray v. Cleaning Systems & Supplies, Inc., 834 F. Supp. 123, 125-26 (S.D.N.Y. 1993) (applying Tennessee law and finding that award should be reduced by employer's percentage of fault); Gagne v. Carl Bauier Schraubenfabrick, 595 F. Supp. 1081, 1088 (D. Me. 1984) (stating employer's fault to be determined by jury); Dietz v. General Elec. Co., 821 P.2d 166, 171 (Ariz. 1991) (concluding that employer's fault must be assessed despite statute

join the employer as a phantom party not for contribution or liability purposes but for allocation purposes through a special

---

prohibiting suit against employer); Associated Constr. & Eng'g Co. v. Workers' Compensation Appeals Bd., 587 P.2d 684, 692 (Cal. 1978) (allowing tort-feasor to argue employer's negligence); Mills v. MMM Carpets, Inc., 1 Cal. Rptr. 2d 813, 814 (1991) (stating that employer's fault to be considered to adhere to statutory requirement of allocation of fault); Williams v. White Mountain Constr. Co., Inc., 749 P.2d 423, 429 (Colo. 1988) (determining employer's fault by percentage); Espaniola v. Cawdrey Mars Joint Venture, 707 P.2d 365, 372-73 (Haw. 1985) (holding evidence of employer's negligence was for allocation purposes, and not for liability purposes); Runcon v. Shearer Lumber Prod., Inc., 690 P.2d 324, 330-31 (Idaho 1984) (holding that award should be reduced because of employer's fault); Doyle v. Rhodes, 461 N.E.2d 382, 385 (Ill. 1984) (holding workers' compensation does not protect employer from allocation of fault); Sterba v. Jay, 816 P.2d 37, 88 (Kan. 1991) (holding that even though employer could not be joined, employer's fault must be assessed for allocation purposes); Anderson v. National Carriers, Inc., 695 P.2d 1293, 1298 (Kan. App. 1985) (declaring employer necessary to allocate fault); Dix & Assoc. v. Key, 799 S.W.2d 24, 29 (Ky. 1990) (concluding that jury's allocation of employer's fault was proper); Gauthier v. O'Brien, 618 So. 2d 825, 829, 833 (La. 1993) (determining that employer's fault is considered and its percentage then distributed between all negligent persons by their individual shares of fault); Kordosky v. Conway Fire & Safety, Inc., 304 N.W.2d 616, 619 (Minn. 1981) (stating that employer's fault to be considered in allocation process); Lambertson v. Cincinnati Corp., 257 N.W.2d 679, 689 (Minn. 1977) (concluding that contribution allowed in percentage of employer's fault); Leonard v. Johns-Manville Sales Corp., 305 S.E.2d 529, 532-33 (N.C. 1983) (determining that although employer not joined as defendant, its negligence is considered and award reduced by amount employer would have been entitled to through subrogation); Montoya v. AKAL Sec., Inc., 838 P.2d 971, 975 (N.M. 1992) (holding that worker not entitled to recover entire award if employer partially at fault); Taylor v. Delgarno Transp., Inc., 667 P.2d 445, 448 (N.M. 1983) (holding that jury may include employer in apportioning liability); Bode v. Clark Equip. Co., 719 P.2d 824, 837 (Okla. 1986) (holding that negligence of employer must be considered); Stark v. Posh Constr. Co., 162 A.2d 9, 12 (Pa. 1960) (deciding that equity dictates that employer's fault be considered); Dresser Indus. v. Lee, 1993 WL 433292, at *42 (Tex. 1993) (holding that workers' compensation does not protect employer from fault allocation); Sullivan v. Scoular Grain Co., 853 P.2d 877, 880 (Utah 1993) (holding that failure to include employer is contrary to allocation requirement); Connar v. West Shore Equip., 227 N.W.2d 660, 662 (Wis. 1975) (holding that failure to apportion employer's fault was reversible error); Burton v. Fisher Controls Co., 723 P.2d 1214, 1218 (Wyo. 1986) (holding that consideration of employee's supervisor's negligence was proper); *see also* National Casualty Co. v. City of Poughkeepsie, 812 F. Supp. 439, 441 n.3 (S.D.N.Y. 1993) (holding carrier could argue that insurance liability should be reduced by employer's fault); Lake v. Construction Mach., Inc., 787 P.2d 1027, 1031 (Alaska 1990) (holding employer's negligence is admissible to determine if 100% at fault); Fabre v. Marin, 623 So. 2d 1182, 1185-86 (Fla. 1993) (holding that fault of joint tort-feasor immune via spousal immunity could be considered in allocation process); Manchester v. Bankhead Corp., 125 A.D.2d 740, 741 (N.Y. App. Div. 1986) (holding that employer's negligence properly determined in third party action).

verdict form.[119] However, utilization of the term phantom party[120] and examination of only those allocation cases that dubbed the employer a phantom party, rather than referring to jurisdictions that also require allocation without naming the employer the phantom, admittedly may have caused the court to concentrate on the *joinder* of a phantom party rather than the *allocation* of fault.[121] Allocation is what was sought, not joinder.

In finding against joinder for allocation, the trial court acknowledged "the merits of each party's position."[122] The court did not reject the defendant's argument out of hand, but found no "clear command" for joinder and, accordingly, chose to opt for the "scales [that] tipped in favor of orthodoxy, in other words, against the unusual notion of a 'phantom party.'"[123] The court further expressed its desire that the issue be addressed by the Mississippi Supreme Court.[124] With all due respect to the *White* trial court, the authors express their disagreement with the court's decision not to allow allocation of fault and urge the Mississippi Supreme Court and the United States District Courts for Mississippi to consider the issue anew. Although the designation of "phantom party" is not required, allocation of fault to negligent participants, not joined, for whatever reason, is required.

In keeping with the statutory requirement that fault shall be allocated regardless of any phantom designation, the jury should be required to consider the employer's fault as well.[125] Furthermore, unlike in some states, the Mississippi employer is not statutorily exempted from fault assessment.[126] Certainly, if the Legislature had intended to create a fault allocation exception, it could have done so. The named joint tort-feasor can have his fault properly allocated between all negligent participants,[127] without disturbing the exclusive Workers' Compensation remedy by allowing the jury to consider the employer's fault,[128] without joining the employer as a named defendant or subjecting the employer to contribution or liability.[129]

---

[119] Judge Neal Biggers, assigned to two companion cases, entered an order on the motion to join the phantom party stating that the "addition of a non-party is not necessary for the purposes requested by the plaintiff's [sic] motion to join a phantom party." Frazier v. Esmark Apparel, Inc., CA WC 90-57-S-D. The companion cases were later transferred to Judge Senter.

[120] *See, e.g.*, *Chaney*, 906 F.2d at 1308 n.7 (holding that employer should have been included in jury interrogatories as phantom party).

[121] *See supra* notes 31-34 and accompanying text.

[122] *White*, 788 F. Supp. at 909.

[123] *Id.*

[124] *Id.* (certification is unfortunately not available to this court).

1. *Allocation of Fault Under Phantom Designations*

The United States Circuit Court of Appeals for the Eighth Circuit adopted the term "phantom party" term in *Chaney v. Falling Creek Metal Prod., Inc.*[130] The court considered Arkansas' exclusive workers' compensation laws[131] (which are similar to Mississippi's) but nevertheless held, as we urge here, that an employer is to be included as a phantom party to allow the jury to allocate fault between all negligent participants.[132]

---

[125] MISS. CODE ANN. § 85-5-7(2) -(4), (7) (1991) invokes the word "shall" which mandates allocation.

[126] *See, e.g.*, IND. CODE ANN. § 34-4-33-2 (West 1993) (providing that although nonparty's fault is to be considered, employer is specifically excluded from the definition of nonparty); 1993 Wash. Legis Serv. 496 (West) (amending WASH. REV. CODE ANN. § 4.22.070 (West 1988) to specifically exclude employers from fault assessment).

[127] MISS. CODE ANN. § 85-5-7(2) (1991).

[128] *See* MISS. CODE ANN. § 71-3-7 (1989). This section provides that worker's compensation is payable without regard to causal fault. *Id.* The employee will still receive compensation benefits from the employer. *See* MISS. CODE ANN. § 71-3-71 (1989). However, the third party will not be paying for someone's negligence because his liability, a minimum of 50%, will be that of his own making. *See supra* note 14 and accompanying text.

[129] *See generally* E. J. Geekie, Jr., *The Exclusive Remedy Controversy: Can Third Party Inequity Be Alleviated Without Disturbing The Principles of Workers' Compensation?* 29 ST. LOUIS U. L.J. 490, 505-08 (1985) (stating that award reduced by degree of employer's negligence). *Cf.* Jaser v. New York Prop. Ins. Underwriting Ass'n, 815 F.2d 240, 243 (2d Cir. 1987) (holding that through Federal Rule of Civil Procedure 19, court can reduce final judgment by fault attributable to non-parties).

[130] 906 F.2d 1304 (8th Cir. 1990).

[131] ARK. CODE. ANN. § 11-9-401 (Michie Supp. 1993).

Likewise, the United States Court of Appeals for the Tenth Circuit requires the use of a phantom party in situations where the employer is immune from liability based on workers' compensation but where the comparative negligence statute provides for a specific allocation of fault. In *Prince v. Leesona Corp.*,[133] the Tenth Circuit held that the purpose behind the comparative negligence statute[134]

> is to hold each defendant liable only in proportion to that defendant's fault. Even though the employer is an immune phantom in this case, the plaintiff is not without a remedy against the employer. Worker's compensation provides a remedy even if the employer was guilty of no fault at all.[135]

The "application of comparative causation to cases involving worker's compensation does not change this analysis. . . . Further it would not be rational to increase another defendant's liability above the level of his fault simply because worker's compensation is involved." [136]

Oklahoma, like the Eighth and Tenth Circuit Courts of Appeals, recognizes the necessity of joining the employer as a phantom party despite the exclusive remedy provided under the state's workers' compensation laws. In *Bode v. Clark Equip. Co.*,[137] the court stated that:

---

[132] *Chaney*, 906 F.2d at 1308 n.7.

[133] 720 F.2d 1166, 1171 (10th Cir. 1983).

[134] KAN. STAT. ANN. § 60-258a (Supp. 1992).

[135] *Prince*, 720 F.2d at 1172.

[136] *Id.*; *see also Hardin*, 691 F.2d at 454 (applying Kansas law to attach term "phantom party" to employer).

[137] 719 P.2d 824 (Okla. 1986).

> [t]he cornerstone of comparative negligence[138] is founded on attaching liability in direct proportion to the fault of each entity whose negligence caused the damage. With this principle in mind, . . . we reach the unavoidable conclusion that the negligence of a party defendant must be combined with the percentage of negligence attributable to non-party tort-feasors.[139]

Kansas also employs the concept of phantom party employers. *Anderson v. National Carriers, Inc.*[140] held that because the employer was a necessary participant for the allocation of fault[141] but since he could not be joined as a party[142] that the court would join the employer as a phantom party for the purpose of fault allocation.[143]

2. *Allocation Without Phantom Designation*

Where the defendant makes a motion to join a phantom party employer as in *White v. Esmark Apparel, Inc.*,[144] the California Court of Appeals for the Sixth District has articulated the same argument we make here for allowing the employer's fault to be considered even though the employer is immune from liability.[145] In *Mills*, the court affirmed the named joint tort-feasor's right to have his fault allocated between all participants who contributed to the injury.[146] In 1986, California enacted the Fair Responsibility Act[147] which provides in part that "[e]ach defendant shall be liable only for the amount of non-economic damages allocated to that defendant's percentage of fault. . . ."[148] Pursuant to the Act, the defendant in *Mills* argued that the employer's fault was to be considered and the jury award accordingly decreased by the employer's percentage of fault.[149] Although the trial court allowed the non-defendant employer's fault to be determined, which the jury assessed at 60%, the court did not reduce the non-economic damages by the employer's percentage.[150] In reversing the trial court, the Court of Appeals for the Sixth District of California read the Fair Responsibility Act, which was not "intended, in any way to alter the law of immunity,"[151] together with the state's Workers' Compensation Laws[152] and held that "the negligent employer's fault in a case like this one is measured, not in order to impose liability on it, but to determine the comparative fault and commensurate liability of a defendant in the action."[153]

---

[138] Oklahoma's comparative negligence statute, title 23, section 13 of the Oklahoma Statute Annotated, speaks in terms of the negligence of persons, not parties. OKLA. STAT. ANN. tit. 23, § 13 (West 1987). Similarly, section 85-5-7(3) of the Mississippi Code Annotated speaks in terms of allocating fault between persons, not parties. MISS. CODE ANN. § 85-5-7(3) (1991).

[139] *Bode*, 719 P.2d at 827.

[140] 695 P.2d 1293 (Kan. 1985).

[141] KAN. STAT. ANN. § 60-258(b) (Supp. 1992).

[142] Kansas' Workers' Compensation exclusivity provision is similar to Mississippi's exclusivity provision. *Compare* KAN. STAT. ANN. § 44-504 (Supp. 1992) *with* MISS. CODE ANN. § 71-3-9 (1989).

[143] *Anderson*, 695 P.2d at 1298.

[144] 788 F. Supp. 907 (N.D. Miss. 1992).

[145] Mills v. MMM Carpets, 1 Cal. Rptr. 2d 813, 814 (1991).

[146] *Mills*, 1 Cal. Rptr. 2d at 814.

[147] CAL. CIV. CODE §§ 1431 to -.5 (West Supp. 1993).

Texas has likewise recently joined the ranks of jurisdictions with allocation statutes requiring juries to consider employers' negligence. In *Dresser Industries, Inc. v. Lee*,[154] the Supreme Court of Texas clarified its position on consideration of the employer's fault by holding that Texas' Workers' Compensation Laws,[155] when read together with its Comparative Responsibility Laws,[156] could not bar the defendant from introducing evidence of the employer's negligence.[157] The court held that, to allow otherwise would prevent the defendant from presenting his defense that another may be at least partially liable for the plaintiff's injuries. "With no one allowed to show what part the employer's conduct played, the jury would be left to wonder whether anyone other than the defendant could have caused the plaintiff's injuries."[158] Therefore, the defendant's limitation of liability to his degree of fault would be jeopardized, which is contrary to Texas' comparative negligence scheme.[159] The Texas Supreme Court likened workers' compensation to a settlement which is to be reduced from the final award in order to give the nonsettling defendant credit.[160]

---

[148] *Id.* § 1431.2(a).

[149] *Mills*, 1 Cal. Rptr. 2d at 815.

[150] *Id.*

[151] CAL. CIV. CODE § 1431.3 (West Supp. 1993). *Cf.* MISS. CODE ANN. § 85-5-7(5) (1991) ("Nothing in this section shall eliminate or diminish any defenses or immunities which currently exist . . . ."); *see also* MISS. CODE ANN. § 85-5-7(8) (1991) (providing that statute should not be construed to alter immunity).

[152] CAL. LAB. CODE §§ 3200 to 6149 (West 1989).

[153] *Mills*, 1 Cal. Rptr. 2d at 818; *see also* Scales v. St. Louis-S.F. Ry. Co., 582 P.2d 300, 306-07 (Kan. 1978) (stating that phantom party appropriate to compare employer's fault); Brown v. Keill, 580 P.2d 867, 873-74 (Kan. 1978) (holding when statute requires allocation of fault, no social policy requires defendant to pay more than his allocated share).

[154] 1993 WL 433292 (Tex.).

[155] TEX. REV. CIV. STAT. ANN. art. 8308-4.01,-4.04 (West Supp. 1993).

In its 1993 decision of *Sullivan v. Scoular Grain Co. of Utah*,[161] Utah joined the growing number of states which recognize that to effectuate their tort reform acts which provide for allocation of fault, the employer must be included so that the jury can apportion fault between all liable participants.[162] The Utah Supreme Court held that an employer's fault must be considered even though the term defendant as used in its tort reform act is defined as "any person not immune from suit who is claimed to be liable of fault to any person seeking recovery."[163] The court concluded that exclusion of an employer would contravene the statutory language that no defendant is to be held liable for damages in a greater percentage than his proportionate fault.[164]

In reaching its decision, the court noted that the statute had to be read in the context of the state's tort reform act which abolished joint and several liability. Accordingly, the court held:

---

[156] TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001 to -.016 (West Supp. 1993).

[157] *Dresser*, 1993 WL 433292 at *4.

[158] *Id.*

[159] *Id.* at *3-4.

[160] *Id. See generally supra* notes 76-104 and accompanying text.

[161] 853 P.2d 877 (Utah 1993).

[162] *Sullivan*, 853 P.2d at 881.

[163] *Id.* at 881 (citing UTAH CODE ANN. § 78-27-37(1) (1953) (superseded)).

[164] *Id.* at 878.

> If the jury is prevented in this case from considering relative fault of the [employer] in the apportionment process, . . . the other defendants will be held liable . . ., not only for their own proportionate share of fault, but also for the proportionate fault attributable to the [employer]. Thus, one of the major evils of joint and several liability would result, and the stated purpose of the legislature in abolishing it would be frustrated.[165]

Although Mississippi has not completely abolished joint and several liability, the rationale for requiring the employer's fault to be considered is equally persuasive to at least limit joint and several liability to the 50% cap of the recoverable damages.

Finally, the Utah court's decision in *Sullivan* supports the argument presented in this Article that allowing the employer's fault to be allocated is not an action at law that imposes liability on the employer in contradiction of the exclusive remedy available through workers' compensation, but rather constitutes a mandate that the jury consider the actions of the employer in the allocation of fault process.[166]

Similarly, Arizona has decided the allocation issue in favor of considering the employer's fault. In *Dietz v. General Electric Co.*,[167] the Arizona Supreme Court distinguished the assessment of fault for determination of several liability and determination for contribution purposes.[168] Arizona's statutory scheme includes subsections that provide: (1) for allocation of fault between all persons who may have been responsible for the injury including those persons not named in the action;[169]

---

[165] *Id.* at 880.

[166] *Id.* at 881; *see* Espaniola v. Cawdrey Mars Joint Venture, 707 P.2d 365, 373 (Haw. 1985) ("Our decision here is meant to facilitate the determination of causal negligence, not liability . . . . Evidence of the negligence or other fault of the employer would be admissible to enable the trier of fact to decide the degree of each actor's negligence or other fault").

[167] 821 P.2d 166 (Ariz. 1991).

[168] *Dietz*, 821 P.2d at 168.

[169] ARIZ. REV. STAT. ANN. § 12-2506(B) (Supp. 1993).

(2) that assessment of fault against non-parties does not subject them to liability;[170] (3) for no contribution against an employer;[171] and (4) that a defendant is liable only for the percentage of the damages allocated to him based on his percentage of fault.[172] In summary, Arizona, like Mississippi, has a statutory scheme that expressly prohibits the consideration of the employer's fault through workers' compensation and, yet, expressly requires the allocation of fault of all potentially liable participants. When reviewed in light of the purpose behind comparative negligence and with the backdrop of Arizona tort reform taking shape through the above referenced statutes, the court found that assessing nonparty fault should prevail over the prohibition of fault assessment against employers.[173]

Likewise, this same argument should illustrate the desirability of considering the Mississippi employer's fault in the allocation process. Section 85-5-7(2) of the Mississippi Code pertains to allocation of fault between participants for determining several liability (joint and several up to 50% of recoverable damages); section 85-5-7(4) concerns the percentage of fault attributable to defendants for contribution purposes; and section 85-5-7, subsections (5) and (8), address the maintenance of previously existing immunities. Consequently, when given proper statutory construction[174] and when viewed in the framework of tort reform, no change in Mississippi's Workers' Compensation Laws[175] need be made and no immunity waived to give effect to the statutory requirement of allocating fault to the employer for liability purposes. Rather, the plaintiff's recoverable damages are simply reduced by the employer's percentage of fault, not to be reduced below 50% of the recoverable damages.

Although allocation can be had without encroaching upon the exclusive remedy provided in the Workers' Compensation

---

[170] *Id.*

[171] *Id.* § 12-2501(F)(3).

[172] *Id.* § 12-2506(A).

[173] *Dietz*, 821 P.2d at 171.

[174] *See supra* notes 44-75 and accompanying text.

[175] MISS. CODE ANN. §§ 71-3-1 to -163 (1989 & Supp. 1993).

Law,[176] the most equitable result can be reached through modification of the employer's right to subrogation.[177]

> The question here becomes very precise: did the compensation acts, in conferring immunity on the employer from common-law suits, mean to do so only at the expense of the injured employee, or also at the expense of outsiders? One answer is that whereas the injured employee got *quid pro quo* in receiving assured compensation payments as a substitute for tort recoveries, the third party has received absolutely nothing and, hence, should not be impliedly held to have given up rights which he had before. It is unfair, so the argument runs, to pull the third party within the principle of mutual sacrifice when his part is to be all sacrifice and no corresponding gain. . . . The legislature should face squarely the question whether the third party who happens to be so unfortunate as to get tangled up with a compensable injury should, so to speak, individually subsidize the compensation system by bearing alone a burden which normally he could shift to the employer.[178]

As it now stands, the named joint tort-feasor will be severally liable for his percentage of fault, or jointly and severally liable for 50% of the recoverable damages.[179] However, the employer, despite an allocation of fault assessed against him, would arguably still have the right to be subrogated to the amount received by the employee from the named joint tort-feasor, up to the amount paid out by the employer in compensation benefits.[180] Accordingly, the subrogation statute should be amended to prevent the employer who has been found to be at fault in a third party action from recovering 100% of the compensation benefits paid out.[181] The amount to be reimbursed should be reduced by the percentage of his fault up to the entire amount for which the employer would be otherwise statutorily liable.[182] In adopting such a method, Idaho found that this approach balanced the competing interests of: (1) maintaining workers' compensation's exclusive remedy, (2) preventing the plaintiff from receiving double recovery (compensation and third party award), (3) preventing a person from benefitting from his own wrong (no third party action liability and subrogation), and (4) allowing the named joint tort-feasor's right of allocation and contribution.[183] Kentucky likewise utilizes the reduction of subrogation rights.[184] The Kentucky approach allows a judgment to be entered against the named joint tort-feasor up to his percentage of fault; thus, no right of contribution exists. The employer is then only entitled to recoup from the employee that percentage of fault attributable to the named joint tort-feasor.[185]

---

[176] MISS. CODE ANN. § 71-3-9 (1989 & Supp. 1993).

[177] MISS. CODE ANN. § 71-3-71 (1989 & Supp. 1993).

[178] Lambertson v. Cincinnati Corp., 257 N.W.2d 679, 689 (Minn. 1977) (quoting Arthur Larson, *Workmen's Compensation: Third Party's Action Over and Against Employer*, 65 NW. U. L. REV. 351, 420 (1970)).

[179] MISS. CODE ANN. § 85-5-7(2)&(3) (1991).

[180] MISS. CODE ANN. § 71-3-71 (1989).

Yet another modification could be made to the Workers' Compensation Laws and section 85-5-7(4) of the Mississippi

---

[181] *See, e.g.*, N.C. GEN. STAT. § 97-10.2(e) (Michie 1991). North Carolina provides:

> [The] court shall reduce the damages awarded by the jury against the third party by the amount which the employer would otherwise be entitled to receive therefrom by way of subrogation hereunder and the entire amount recovered, after such reduction, shall belong to the employee . . . and the third party shall have no further right by way of contribution.

Id. Additionally, Kansas has codified its reduction approach. *See* KAN. STAT. ANN. § 44-504(d) (Supp. 1992). Kansas' statute provides that the employer's subrogation right is diminished by fault assessed against the employer. *Id.* Also, New Mexico's relevant statute provides that the employer's reimbursement is reduced by his percentage of fault. *See* N.M. STAT. ANN. § 52-1-10.1 (Michie Supp. 1991).

[182] *See, e.g.*, Runcorn v. Sheaner Lumber Prod., Inc., 690 P.2d 324, 331 (Idaho 1984) (holding damages reduced by percentage of liability assessed against employer). *See generally* Robin C. Miller, Annotation, *Third-Party Tort-feasor's Right to Have Damages Recovered By Employee Reduced by Amount of Employee's Workers' Compensation Benefits*, 43 A.L.R.4th 849, 875-81 (1986) (listing states permitting reduction based on employer's negligence); *see also* Kordosky v. Conway Fire & Safety, Inc., 304 N.W.2d 616, 619-20 (Minn. 1981) (holding that amount to be reimbursed to employer is reduced by his fault).

[183] *Runcorn*, 690 P.2d at 331.

[184] Dix & Assoc. Pipeline Contractors v. Key, 799 S.W.2d 24, 30 (Ky. 1990).

[185] *Dix. & Assoc. Pipeline Contractors*, 799 S.W.2d at 30-31.

Code to prevent the employer from gaining from his own negligent conduct. The named joint tort-feasor could be given a right of contribution to the extent that the named joint tort-feasor paid more than his allocated share of fault.[186] Contribution, however, would not be necessary except to the extent that the named joint tort-feasor was jointly and severally liable for 50% of the plaintiff's recoverable damages.[187] The ability to obtain contribution in an employer/third person joint tort-feasor situation has long been debated and the policy arguments for and against it are said to be equally persuasive.[188] "Contribution is a flexible, equitable remedy designed to accomplish a fair allocation of loss among parties. Such a remedy should be utilized to achieve fairness on particular facts, unfettered by outworn technical concepts like common liability."[189] However, to maintain the cap on workers' compensation damages pursuant to statute,[190] contribution should be limited to the amount the employer would otherwise have paid regardless of fault.[191]

IV. CONCLUSION

Allocation of fault among all participants involved in the occurrence giving rise to the injury or cause of action, including absent, settling and immune tort-feasors, is statutorily mandated.[192] Section 85-5-7 of the Mississippi Code is the vehicle by which negligent participants may be held liable for the damage for which they are responsible and not for the damage attributable to others, except for the benevolent 50% judgment recovery requirement. The last step necessary for Mississippi to achieve true personal responsibility and personal liability for one's own negligent acts is the abolition of the 50% joint and several liability requirement.[193]

---

[186] *See generally* Joel E. Smith, Annotation, *Modern Status of Effect of State Workmen's Compensation Act on Right of Third-Person Tort-feasor To Contribution or Indemnity From Employer of Injured or Killed Workman*, 100 A.L.R.3d 351, 362-65 (1980) (identifying states which at time allowed contribution).

[187] *See* Williams v. White Mountain Constr. Co., 749 P.2d 423, 429 (Colo. 1988) (holding that without joint and several liability, right to contribution does not exist); *Dietz*, 821 P.2d at 168 (allowing no contribution from employer, because liability is several).

[188] 2A ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 76.11, at 14-720 to -21 (1993).

[189] *Lambertson*, 257 N.W.2d at 128.

[190] MISS. CODE ANN. § 71-3-17 (1989).

[191] *See, e.g.*, J.I. Case Co. v. McCartin-McAuliffe Plumbing & Heating, Inc., 516 N.E.2d 260, 268 (Ill. 1987) (holding that third party entitled to compensation); Stark v. Posh Constr. Co., 162 A.2d 9, 12 (Pa. 1960) (holding that employer should contribute share up to statutory amount under workers' compensation).

"Deep pocket" individuals and corporations should no longer be viewed as litigation targets because of the likelihood that they may be required to satisfy the entire award, even though they have a minority percentage of fault.[194]

---

[192] *See supra* note 12, 22-29, 76-90, 117-28 and accompanying text.

[193] MISS. CODE ANN. § 85-5-7(2) (1991); *see supra* notes 19-23 and accompanying text.

[194] *See, e.g.,* Walt Disney World Co. v. Wood, 515 So. 2d 198, 199 (Fla. 1987) (holding defendant Walt Disney liable for 86% of judgment although only 1% at fault where plaintiff was liable for 14% and absent joint tort-feasor was found 85% at fault). *Walt Disney* prompted passage of FLA. STAT. ANN. § 768.81(3) (West Supp. 1993), which provides that a party shall be liable only for his percentage of fault, despite the absence of a joint tort-feasor. *Id.*

AN EVALUATION OF THE MISSISSIPPI PRODUCTS LIABILITY ACT OF 1993

Bobby Marzine Harges[*]

TABLE OF CONTENTS

Introduction 698
I. Mississippi Products Liability Law in the Wake of *State Stove Mfg. Co. v. Hodges* 699
II. The Elements of Proof in a Products Liability Action 705
III. Design Defects 708
IV. The State of the Art Defense 715
V. Manufacturing or Construction Defects 716
VI. Failure to Warn 718
VII. Breach of Warranty 722
VIII. Damages Recoverable in a Products Liability Action 729
IX. Are Punitive Damages Recoverable in Products Liability Actions? 733
X. What Defenses are Available in a Products Liability Action? . . 744
XI. How the Mississippi Products Liability Act of 1993 Changes the Mississippi Wrongful Death Act 753
XII. Does the Mississippi Products Liability Act Overrule the *Shainberg* Doctrine? 765
XIII. What Effect Will the Mississippi Products Liability Act Have on Business in Mississippi? 769
XIV. Conclusion 772

---

[*] Associate Professor of Law, Loyola University School of Law (New Orleans); LL.M. 1990, Harvard University School of Law; J.D. 1986, University of Mississippi School of Law; B.S. 1982, Mississippi State University School of Electrical Engineering. Special thanks to Gaynell Williams for her comments on an earlier draft of this Article and for ideas and support. Special thanks to Gary Myers for his comments on an earlier draft of this Article. Eileen McGowan, Kari Mercer and Anthony Van Johnson provided valuable research assistance, while Linda J. Veals provided valuable clerical assistance on this Article.

INTRODUCTION

In 1966, the Mississippi Supreme Court decided *State Stove Manufacturing Co. v. Hodges*.[1] This decision was a major development in Mississippi law because of the court's adoption of strict liability in tort, as described in Section 402A of the Restatement (Second) of Torts, as a theory of recovery in products liability actions.[2] In *State Stove Manufacturing Co.*, the court also abrogated the privity of contract requirement for products liability actions based on negligence. Since the court's decision in *State Stove Manufacturing Co.*, strict liability in tort has become the dominant theory of recovery in products liability actions in Mississippi.

In 1993, the Mississippi Legislature enacted the Mississippi Products Liability Act of 1993.[3] This Act was part of a package of tort reform legislation that was enacted by the Mississippi Legislature in that year. The legislation represents a strict liability in tort approach to products liability. While generally codifying the existing law of products liability in Mississippi, the Products Liability Act also makes several changes to the law. This Article will discuss the law of products liability in Mississippi as it existed prior to the enactment of the Products Liability Act. This Article will also examine the theories of recovery, elements of proof, defenses available and types of damages recoverable in a products liability action. Further, this Article will examine the Products Liability Act to ascertain what changes have been made to Mississippi law as it relates to products liability actions. While the Products Liability Act generally codified existing law, it left many other questions unanswered. In discussing the current state of Mississippi products liability law, the writer will attempt to answer those questions.

---

[1] 189 So. 2d 113 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967).

[2] "Products liability is the name currently given to the area of the law involving the liability of those who supply goods or products for the use of others to purchasers, users, and bystanders for losses of various kinds resulting from so-called defects in those products." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 95 (5th ed. 1984).

[3] MISS. CODE ANN. § 11-1-63 (Supp. 1993). Hereinafter, the Mississippi Products Liability Act of 1993 will be referred to as "the Mississippi Products Liability Act," or merely "the Act."

Section 5 of the Act states, "[T]his act shall take effect and be in force from and after July 1, 1993. Procedural provisions of this act including subsections (1)(a), (b), (c) and (d) of Section 2 shall apply to all pending actions in which judgment has not been entered on the effective date of the act and all actions filed on or after the effective date of the act. All other provisions shall apply to all actions filed on or after July 1, 1994." 1993 Miss. Laws ch. 302, § 5 (codified at MISS. CODE ANN. § 11-1-63 (Supp. 1993)).

I. MISSISSIPPI PRODUCTS LIABILITY LAW IN THE WAKE OF *STATE STOVE MANUFACTURING CO. V. HODGES*

Prior to *State Stove Manufacturing Co. v. Hodges*,[4] a claimant in a products liability action could rely on either a negligence or warranty theory in order to recover against the manufacturer or supplier of a defective product that injured him. In order to recover on a negligence theory, the claimant was required to prove that the manufacturer was negligent in designing, constructing, assembling, inspecting, testing or labeling the product, or in failing to warn the consumer of a dangerous condition of the product.[5] Such proof satisfied the duty and breach elements of the negligence formula.[6] The claimant was also required to prove that there was a causal relation between the manufacturer's negligence and the claimant's harm.[7] Moreover, the manufacturer of a defective product that injured a claimant could escape liability under Mississippi law unless the manufacturer was in privity of contract with the claimant.[8]

Privity of contract between the plaintiff and defendant as a prerequisite to recovery in a products liability action began with *Winterbottom v. Wright*,[9] a case decided in 1842.[10] In

---

[4] 189 So. 2d 113 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967).

[5] Frank L. Maraist & Rhesa H. Barksdale, *Mississippi Products Liability - A Critical Analysis*, 43 MISS. L.J. 139, 144 (1972).

[6] *Id.*

[7] *Id.*

[8] *State Stove Mfg. Co.*, 189 So. 2d at 115; Ford Motor Co. v. Myers, 117 So. 362, 363 (Miss. 1928).

[9] 152 Eng. Rep. 402, 405 (Ex. 1842).

[10] KEETON ET AL., *supra* note 2, § 96.

Winterbottom, the claimant, a driver of a mail-coach, was injured when the mail-coach broke down and overturned. The court found that the claimant could not maintain an action in contract or in tort against the manufacturer of the mail-coach because the claimant had not contracted with the manufacturer. The court held that the manufacturer had contracted with the Postmaster General to keep the coaches in good repair. Since there was no privity of contract between the claimant and the manufacturer, the claimant could not recover against the manufacturer.

The privity of contract requirement between plaintiff and defendant that began with *Winterbottom* became the dominant view in the United States in product related actions until 1916, when *McPherson v. Buick Motor Co.*[11] was decided.[12] In *McPherson*, the plaintiff sustained injuries when he was thrown out of an automobile as a result of the collapse of a defective wheel. The court allowed the plaintiff to maintain a products liability action against the manufacturer even though there was no privity of contract between the plaintiff and the manufacturer. The court found that a manufacturer may be liable to the ultimate purchaser for negligence when the manufacturer places an inherently dangerous product on the market. After *McPherson*, this rule was extended by other courts to include any product which would be dangerous if negligently manufactured.[13]

Although the vast majority of states adopted the *McPherson* rule abrogating the privity requirement, the Mississippi Supreme Court did not adopt the rule.[14] In 1928, the Mississippi Supreme Court adopted the privity requirement in *Ford Motor Co. v. Myers*.[15] In that decision, the court held that privity was necessary in order for the purchaser of a defectively manufactured truck to recover in a negligence action against the manufacturer. Although the privity requirement existed in Mississippi, the Mississippi Supreme Court recognized certain exceptions to that requirement. One exception allowed a claimant injured by a defective product intended for intimate bodily use, such as food or beverages, to recover against the manufacturer or seller without privity of contract.[16] Another exception allowed a claimant injured by a product that was sold in violation of a safety statute to recover against a manufacturer or seller without privity of contract.[17]

---

[11] 111 N.E. 1050 (N.Y. 1916).

[12] KEETON ET AL., *supra* note 2, § 96.

[13] *Id.*

[14] *Id.*

[15] 117 So. 362 (Miss. 1928), *overruled by* 189 So. 2d 113 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967).

Although the claimant was usually in privity with the retailer, he generally could not recover from the retailer, even if the retailer sold the plaintiff a defective product, because the retailer was usually not negligent in selling or marketing the product. This was true particularly if the retailer bought the product from a reputable manufacturer.[18] The retailer could only be liable in a products liability action if: (1) he was somehow negligent in making the sale; (2) he adopted the product as his own; or (3) he was guilty of fraud.[19] As for third parties who were not in privity with either the manufacturer or retailer, they could recover only if the product met one of the privity exceptions mentioned above.[20]

The second theory of recovery available to claimants in products liability actions in Mississippi prior to *State Stove Manufacturing Co.* was strict liability in contract for breach of an implied warranty.[21] As with negligence actions, the claimant had to prove that he was in privity with the manufacturer in order to recover for injuries received from the defective product.[22] When privity existed between the claimant and the retailer, the claimant still had difficulty recovering against the retailer because the law provided that there was no implied warranty unless the seller made the product, was guilty of fraud or negligence, or adopted the product as his own.[23] Hence the claimant had difficulty recovering against both the manufacturer and retailer in a breach of warranty action.

---

[16] *State Stove Mfg. Co.*, 189 So. 2d at 118. The court avoided the privity of contract requirement by finding that there was an implied warranty that the food or beverage was pure and wholesome, and that the plaintiff need only show that the product was defective when it left the factory, that the consumer had possession of it and that he received injury from consuming the product. *Id.* at 117; *see also* Biedenharn Candy Co. v. Moore, 186 So. 628, 629 (Miss. 1939).

[17] *See* Cox v. Laws, 145 So. 2d 703 (Miss. 1962) (allowing plaintiff to sue manufacturer of drug sold without prescription when drug resulted in wrongful death of person using drug).

[18] Maraist & Barksdale, *supra* note 5, at 144-45.

[19] *Id.* at 145.

[20] *Id.* at 144.

[21] *See* Coca-Cola Bottling Works v. Lyons, 111 So. 305, 307 (Miss. 1927) (allowing recovery under implied warranty theory).

As in negligence actions, the Mississippi Supreme Court recognized an exception to the privity requirement in breach of warranty cases. This exception existed in food and beverage cases. In those cases, privity of contract was not an essential part of a cause of action against a manufacturer.[24] The claimant only had to prove that the defect existed when it left the hands of the manufacturer, and that the defect was the proximate cause of the claimant's injury.[25]

The privity of contract requirement in Mississippi prevented many claimants from recovering against manufacturers in products liability actions. Additionally, the problems associated with recovering against retailers in both warranty and negligence actions prevented claimants from recovering against retailers in products liability actions. This all came to a halt in 1966 when the Mississippi Supreme Court decided *State Stove Manufacturing Co. v. Hodges*.[26] This case involved a negligence action by homeowners against the manufacturer of a defective heater and the contractors who constructed the home and installed the heater. The heater exploded, substantially destroying the home. The manufacturer, State Stove Manufacturing Company, defended by alleging that since there was no privity of contract between it and the plaintiffs, it was not liable to the plaintiffs. In responding to State Stove's argument, the court examined the privity requirement. The court noted that virtually every state except Mississippi had abandoned the privity of contract requirement in an action by a consumer against a manufacturer. The court joined those states, but did not stop there. In addressing the basis and theory of a manufacturer's liability to a consumer for a defective product, the court, while acknowledging that the action was based on negligence, stated that strict liability in tort as described in Section 402A of the Restatement (Second) of Torts[27] was the appropriate theory of recovery. Hence, the court adopted strict liability in tort as a theory of recovery in products liability actions. The court further noted that this theory of recovery was not exclusive. Claimants could also rely on the alternative theory of negligence, where appropriate.

---

[22] *See* Harrist v. Spencer-Harris Tool Co., 140 So. 2d 558, 560 (Miss. 1962) (relaxing privity requirement in implied warranty case) (citations omitted).

[23] Maraist & Barksdale, *supra* note 5 at 147-148.

[24] *State Stove Mfg. Co.*, 189 So. 2d at 118; *Lyons*, 111 So. at 306.

[25] *Lyons*, 111 So. at 306.

[26] 189 So. 2d 113 (Miss. 1966).

After abolishing the privity requirement and adopting strict liability in tort, the court found that State Stove was not liable to the plaintiffs. The court refused to extend liability because the water heater as manufactured was not in a defective condition, unreasonably dangerous, and it did not reach the plaintiffs without substantial change in its condition. The court also found that the negligence of the contractors was the intervening, sole proximate cause of the explosion.

Strict liability in tort as a theory of recovery in products liability actions is based on three ideas:

---

[27] RESTATEMENT (SECOND) OF TORTS § 402A (1964). Section 402A provides:

> Special Liability of Seller of Product for Physical Harm to User or Consumer -
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> (2) The rule stated in Subsection (1) applies although
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.

(1) "It is often difficult, if not impossible, to prove negligence on the part of a manufacturer or supplier."[28] This difficulty denied many consumers, injured by defective products, effective remedies against manufacturers or suppliers.

(2) The manufacturer or seller is able to "spread the risk" created by the product that they make or sell.[29] The notion is that the loss should not be borne by the injured party but should be placed on the manufacturer or seller who, by pricing the product, can spread the loss to the consumers.[30] The idea is not a "deep pocket" theory but rather a "risk bearing economic theory."[31]

(3) The imposition of strict liability will promote the cause of accident prevention by inducing greater care on the part of manufacturers and sellers.[32]

With the Mississippi Supreme Court's adoption of strict liability in tort, the claimant no longer had to prove negligence on the part of the defendant in order to recover. The emphasis in an action based on strict liability in tort is placed on the defendant's product, not on the defendant's conduct. This makes it easier for claimants to recover in products liability actions. As a result, strict liability in tort has become the dominant theory of recovery in products liability actions brought in Mississippi.

The Mississippi Legislature adopted the Uniform Commercial Code in 1968.[33] Adoption of the UCC made breach of warranty actions available to claimants in products liability actions in Mississippi, in addition to strict liability in tort and negligence. With the adoption of the UCC, claimants in Mississippi could bring products liability actions based on breach of an express warranty,[34] breach of an implied warranty of merchantability,[35] or breach of an implied warranty of fitness for a particular purpose.[36] The theories available under the UCC were much more expansive than previous law on breach of warranty, which recognized a theory of recovery only for breach of an implied warranty.[37]

---

[28] John W. Wade, *On the Nature of Strict Tort Liability For Products*, 44 MISS. L.J. 825, 826 (1973).

[29] *Id.*

[30] *Id.*

[31] KEETON ET AL., *supra* note 2, § 98.

[32] *Id.*

[33] The Uniform Commercial Code became effective in Mississippi on March 31, 1968.

[34] MISS. CODE ANN. § 75-2-313 (1972).

Another weapon that aids plaintiffs in products liability actions in Mississippi came in 1976 when the Mississippi Legislature enacted section 11-7-20 of the Mississippi Code, which abolished the privity of contract requirement in all actions for personal injury, property damage or economic loss regardless of whether the action arose out of negligence, strict liability or breach of warranty.[38] With the abolishment of that requirement, claimants could now sue manufacturers, wholesalers, retailers and anyone else in the distribution chain directly.[39]

After Mississippi's adoption of the UCC and its abolishment of the privity requirement, and after *State Stove Manufacturing Co.* was decided by the Mississippi Supreme Court, claimants could bring products liability actions based on negligence, strict liability in tort and breach of warranty. Each of these theories will be examined in this Article.

II. THE ELEMENTS OF PROOF IN A PRODUCTS LIABILITY ACTION

After the court's decision in *State Stove Manufacturing Co. v. Hodges*,[40] a plaintiff could base a products liability action on one or more theories: (1) negligence, (2) strict liability in tort, or (3) breach of a warranty. In order to recover in a products liability action in Mississippi based on either negligence or strict liability in tort, the plaintiff had to prove by a preponderance of the evidence that the product was defective, that the defect existed at the time the product left the hands of the manufacturer, that its defective condition made the product unreasonably dangerous to the plaintiff, and that the product was the proximate cause of the harm to the plaintiff.[41] Privity of contract was not necessary in a suit filed by a consumer against a manufacturer.[42] The product could be defective (1) because of a manufacturing or construction defect,[43] (2) because of a design defect[44] or (3) because the manufacturer failed to adequately warn the user or consumer about a dangerous aspect of the product.[45]

---

[35] MISS. CODE ANN. § 75-2-314 (1972).

[36] MISS. CODE ANN. § 75-2-315 (1972).

[37] *See supra* notes 21-25 and accompanying text. The UNIFORM SALES ACT (1906) was never adopted in Mississippi. Maraist & Barksdale, *supra* note 5, at 147 n.52.

[38] Deville Furniture Co. v. Jesco, Inc., 423 So. 2d 1337, 1339 (Miss. 1982). *See* MISS. CODE ANN. § 11-7-20 (Supp. 1993) ("In all causes of action for personal injury or property damage or economic loss brought on account of negligence, strict liability or breach of warranty, including actions brought under the provisions of the Uniform Commercial Code, privity shall not be a requirement to maintain said action.").

[39] *But see* the *Shainberg* doctrine, *infra* Section XII.

[40] 189 So. 2d 113 (Miss. 1966).

In a cause of action based on negligence, the plaintiff had to prove that the defect occurred through some specific fault of the defendant. Under this theory, the plaintiff had to prove the precise point at which the product became defective, and which agent of the defendant was negligent in either causing the condition or in failing to detect it. These things are difficult, if not impossible, to prove on the part of the manufacturer or supplier.[46] Additionally, the plaintiff had to prove that he sustained damages and that the defect was the proximate cause of his damages. Although negligence was a viable cause of action, it was not favored by plaintiffs because of the difficulty involved in proving the necessary elements.

When the cause of action was based on strict liability in tort, the plaintiff was relieved of proving that the defect occurred through some specific fault of the defendant. With strict liability in tort, the plaintiff only had to prove that he sustained injury from the product, that the injury resulted from a defect in the product which rendered it unreasonably dangerous, and that the defect existed at the time it left the hands of the defendant.[47] This theory was used much more often by plaintiffs because of the relative ease of establishing these requirements.

---

[41] Early-Gary, Inc. v. Walters, 294 So. 2d 181, 186 (Miss. 1974).

[42] *State Stove Mfg. Co.*, 189 So. 2d at 115; MISS. CODE ANN. § 11-7-20 (Supp. 1993) (codifying retraction of privity requirement).

[43] Ford Motor Co. v. Adams, 223 So. 2d 638, 641 (Miss. 1969).

[44] *See* Toliver v. General Motors Corp., 482 So. 2d 213, 214 (Miss. 1986) (holding car manufacturer had legal duty to design product which was not unreasonably dangerous); Dunson v. S.A. Allen, Inc., 355 So. 2d 77, 78-79 (Miss. 1978) (finding manufacturer that contributed to unreasonably dangerous product was liable); Hamilton Fixture Co. v. Anderson, 285 So. 2d 744, 747 (Miss. 1973) (deciding humidifier design was unreasonably dangerous).

[45] Swan v. I.P., Inc., 613 So. 2d 846, 852 (Miss. 1993).

[46] *See Toliver*, 482 So. 2d at 216 (quoting Wade, *supra* note 28, at 826).

When a plaintiff based a products liability cause of action on breach of a warranty, the plaintiff did not have to prove that the product was unreasonably dangerous. Moreover, privity of contract between the consumer and the manufacturer was not required.[48] In order to recover in an action based on breach of a warranty, the plaintiff had to prove (1) that the warranty existed, (2) that the warranty was false which made the product defective, and (3) that the defect caused the plaintiff's damage.[49]

The Mississippi Products Liability Act (MPLA)

The Mississippi Products Liability Act codifies the basic requirements of proof that existed in Mississippi prior to its enactment. In order to recover in an action for damages under the Mississippi Products Liability Act, the plaintiff must prove by a preponderance of the evidence that, at the time the product left the control of the manufacturer or seller: (1) the product was defective; (2) the defect rendered the product unreasonably dangerous to the user or consumer; and (3) the defect and unreasonably dangerous condition was the proximate cause of the plaintiff's damages.[50] The Act further provides

---

[47] *Toliver*, 482 So. 2d at 216.

[48] *State Stove Mfg. Co.*, 189 So. 2d at 119.

[49] Crocker v. Sears, Roebuck & Co., 346 So. 2d 921, 923 (Miss. 1977).

[50] Section 1(a) of the Mississippi Products Liability Act states:

In any action for damages caused by a product except for commercial damage to the product itself: (a) The manufacturer or seller of the product shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller: (i) 1. The product was defective because it deviated in a material way from the how a product may be defective. A product may be defective because of: (1) a design defect; (2) a manufacturing defect; (3) a failure to warn of a dangerous condition of a product; or (4) a breach of an express warranty.[51] These theories will be discussed in detail in the following sections.

III. DESIGN DEFECTS

One of the ways that a product could be defective in Mississippi is through a defect in design. The question often debated before the passage of the Mississippi Products Liability Act was when a product's design was defective in Mississippi. The Mississippi Supreme Court in *State Stove Manufacturing Co.* adopted section 402A of the Restatement as the standard for determining manufacturer liability in a products liability action.[52] Section 402A provides in part that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property. . . ."[53]

In *State Stove Manufacturing Co.*, the court stated that "defective condition" as used in Section 402A of the Restatement meant that the product had something wrong with it and that it did not function as expected.[54] However, when the product was made as intended and proved not to be reasonably safe, the phrase "defective condition" had no independent

---

> manufacturer's specifications or from otherwise identical units manufactured to the same manufacturing specifications, or 2. The product was defective because it failed to contain adequate warnings or instructions, or 3. The product was designed in a defective manner, or 4. The product breached an express warranty or failed to conform to other express factual representations upon which the claimant justifiably relied in electing to use the product; and (ii) The defective condition rendered the product unreasonably dangerous to the user or consumer; and (iii) The defective and unreasonably dangerous condition of the product proximately caused the damages for which recovery is sought.

MISS. CODE ANN. § 11-1-63(a) (Supp. 1993).

[51] *Id.*

[52] *State Stove Mfg. Co.*, 189 So. 2d at 121.

[53] RESTATEMENT (SECOND) OF TORTS § 402A (1964).

[54] *State Stove Mfg. Co.*, 189 So. 2d at 120.

meaning. In that instance, the issue was whether the product was "unreasonably dangerous" or not reasonably safe.[55] In other words, in design defect cases, the product is made as intended by the manufacturer and the plaintiff is alleging that the product is nevertheless unreasonably dangerous. The issue in design defect cases then becomes, "When is the product unreasonably dangerous?"

The answer to this question has not always been clear because two different tests, the consumer expectations test and the risk utility test, have been used by courts in Mississippi in answering this question. For example, in *Ford Motor Co. v. Matthews*,[56] the Mississippi Supreme Court stated that the "consumer expectations" test is the test used to determine if a product is in a defective condition unreasonably dangerous to the consumer. Under the consumer expectations test, which is derived from comment (i) of Section 402A of the Restatement (Second) of Torts,[57] in order for the plaintiff to recover, the product's defect which causes the plaintiff's injuries must not be one which the plaintiff as an ordinary consumer would know to be unreasonably dangerous to him. In other words, if a consumer with ordinary knowledge of the product would see and appreciate the danger, the plaintiff may not recover for any injury resulting from that danger.[58] The consumer expectations test was also adopted by the United States Fifth Circuit Court of Appeals on several occasions when it interpreted Mississippi substantive law of products liability.[59] Therefore, for some time it appeared that the consumer expectations test was the proper test to use to determine if a product was in a defective condition unreasonably dangerous to the consumer.

---

[55] *Id.*

[56] 291 So. 2d 169 (Miss. 1969).

[57] Comment (i) to Section 402A of the Restatement (Second) of Torts states in part:

> The rule stated in this [s]ection applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm . . . . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

RESTATEMENT (SECOND) OF TORTS § 402A cmt. (i) (1964).

[58] Sperry-New Holland v. Prestage, 617 So. 2d 248, 254 (Miss. 1993).

However, the Mississippi Supreme Court has recently begun to apply the risk utility test as the test used to determine when a product is unreasonably dangerous in a design defect case.[60] Under the risk utility analysis,

> A product is unreasonably dangerous if a reasonable person would conclude that the danger in fact, whether foreseeable or not, outweighs the utility of the product. Thus, even if a plaintiff appreciates the danger of a product, he can still recover for any injury resulting from that danger provided that the utility of the product is outweighed by the danger that the product creates.[61]

From the descriptions of the risk-utility and the consumer expectations tests, it is apparent that the risk-utility test is more favorable to the plaintiff.

In *Whittley v. City of Meridian*,[62] the Mississippi Supreme Court applied the risk utility test when it stated, "In determining whether a product is unreasonably dangerous a reasonable person must conclude that the danger in fact, whether foreseeable or not, outweighs the utility of the product."[63] Additionally, in *Hall v. Mississippi Chemical Express, Inc.*,[64] the Mississippi Supreme Court again applied the risk utility test, stating that "[t]he proper focus in a strict liability case is upon the utility and safety of the product in view of its intended function rather than on the manufacturer's fault or lack thereof."[65]

---

[59] *See, e.g.,* Batts v. Tow-Motor Forklift Co., 978 F.2d 1386, 1392 (5th Cir. 1992); Toney v. Kawasake Heavy Indus., Ltd., 975 F.2d 162, 165 (5th Cir. 1992); Melton v. Deere & Co., 887 F.2d 1241, 1243 (5th Cir. 1989); Gray v. Manitowoc Co., 771 F.2d 866, 869 (5th Cir. 1985).

[60] *See infra* notes 62-68 and accompanying text.

[61] *Prestage*, 617 So. 2d at 254.

[62] 530 So. 2d 1341 (Miss. 1988).

[63] *Whittley*, 530 So. 2d at 1347.

[64] 528 So. 2d 796 (Miss. 1988).

[65] *Hall*, 528 So. 2d at 799.

These cases provide clear evidence of the court's preference for the risk utility test.

More recently, the Mississippi Supreme Court has specifically rejected the consumer expectations test and adopted the risk utility test in products liability cases. In *Sperry-New Holland v. Prestage,*[66] the court stated:

> This Court has clearly moved away from a "consumer expectations" analysis and has moved towards "risk-utility." Consistent with the national trend, the *two most recent decisions* of this Court applied a "risk-utility" analysis to strict products liability. It is true that the Fifth Circuit has held in *Melton, Toney* and *Batts* that Mississippi applies a "consumer expectations" test despite the language in *Hall* and *Whittley*. However, Fifth Circuit decisions, while quite persuasive in their authority, are not binding on this Court. It is this Court's province to decide matters of state law.
>
> It is . . . clear . . . that the trial court understood "risk-utility" to be the law in Mississippi and applied that test correctly.[67]

Hence, it appears that prior to the passage of the Mississippi Products Liability Act, the risk-utility test was the proper test to apply in Mississippi products liability actions to determine if a product's design was unreasonably dangerous.

When the risk-utility analysis is applied, the fact finder may consider several factors in determining whether the product's danger outweighs its utility. These factors, which were espoused by Dean John Wade, were adopted by the Mississippi Supreme Court in *Prestage*. The factors are:

> (1) The usefulness and desirability of the product - its utility to the user and to the public as a whole.
> (2) The safety aspects of the product - the likelihood that it will cause injury and the probable seriousness of the injury.
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.

---

[66] 617 So. 2d 248 (Miss. 1993).

[67] *Prestage*, 617 So. 2d at 256 (emphasis in original).

> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.
> (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
> (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.[68]

Design Defects Under the MPLA

The Mississippi Products Liability Act codifies the cause of action based on a design defect.[69] The design defect theory of recovery, like all theories of recovery under the Mississippi Products Liability Act, is similar to existing Mississippi products liability law based on strict liability in tort. As a result, the plaintiff is relieved of proving that the defect occurred through the defendant's negligence or other fault. In order to recover in a products liability action based on a design defect, the plaintiff must prove by a preponderance of the evidence that at the time the product left the control of the manufacturer or seller: (1) the product was designed in a defective manner; (2) the defective condition rendered the product unreasonably dangerous to the user or consumer; and (3) the defective and unreasonably dangerous condition of the product was the proximate cause of the plaintiff's damages.[70] One question that was left unanswered by the Mississippi Products Liability Act is which test, the consumer expectations test or the risk-utility test, should be used to determine when a particular design is unreasonably dangerous under the Act.

---

[68] *Id.* at 256 n.3; Wade, *supra* note 28, at 837-38.

[69] *See* MISS. CODE ANN. § 11-1-63(a)(i)(3), (ii), (iii) (Supp. 1993).

[70] *Id.*

Since the Mississippi Supreme Court, after the Mississippi Products Liability Act was enacted, stated that the risk-utility analysis should be used to determine if a product is unreasonably dangerous, it should be safe to assume that the risk utility analysis is the appropriate test to use. Until the Mississippi Supreme Court states otherwise, *Prestage* should be read into the Mississippi Products Liability Act.

With respect to products that are defective because of inherent characteristics of the products, the Act apparently accepts comment (i), section 402A of the Restatement (Second) of Torts.[71] Comment (i) is referred to as the "inherent characteristics rule." This rule states that liability should not be imposed on the manufacturer when harm results because of inherent characteristics of a product. Inherent characteristics are those characteristics that are commonly known and cannot be removed from the product without compromising its basic usefulness. Comment (i) is codified in section 1(b) of the Mississippi Products Liability Act which states:

---

[71] RESTATEMENT (SECOND) OF TORTS § 402A cmt. (i) (1964). Comment (i) § 402A of the Restatement (Second) of Torts states:

> (i) *unreasonably dangerous.* The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the consumer as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

Id.

> A product is not defective in design or formulation if the harm for which the claimant seeks to recover compensatory damages was caused by an inherent characteristic of the product which is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability and which is recognized by the ordinary person with the ordinary knowledge common to the community.[72]

What is unclear about the inherent characteristics rule is which products are included within its scope. Comment (i) of the Restatement (Second) of Torts lists products such as ordinary sugar, good whiskey, good tobacco and good butter. Thus, it would appear that a manufacturer would not be liable to a user or consumer based on a design defect if the user or consumer was injured by one of the aforementioned products. However, section 1(b) of the Mississippi Products Liability Act does not contain a list of products, nor does it expressly adopt comment (i). Therefore, it would appear that the Mississippi courts must determine which products are included under Section 1(b) of the Mississippi Products Liability Act.

Another interpretation of section 1(b) of the Mississippi Products Liability Act is that, although it applies to products that cause harm because of inherent characteristics of the product, it does not adopt comment (i) to section 402A of the Restatement (Second) of Torts.[73] This view is espoused by William Liston, a Mississippi attorney. Liston believes that section 1(b) of the Mississippi Products Liability Act creates a bifurcated approach for determining whether a product is defective because of its design. According to Liston,

> Section 1(b) relieves a manufacturer of liability for harm caused by an inherent characteristic of the product if, but only if, (1) such aspect of the product cannot be eliminated without compromising the product's usefulness or desirability, and (2) the harm-causing inherent characteristic is one that would be

---

[72] MISS. CODE ANN. § 11-1-63 (Supp. 1993).

[73] William Liston, *Products Liability in Mississippi After the Enactment of House Bill 1270: The People's Perspective* 26, a paper delivered for the Mississippi Bar Summer School For Lawyers in Biloxi, Mississippi (July 19, 1993) (available at Mississippi Bar Center, Jackson, Mississippi).

> recognized by the ordinary person with the ordinary knowledge common to the community.[74]

Liston asserts that the first requirement is the risk-utility test and the second requirement is the consumer expectations test.

According to Liston, only if the product which causes harm because of an inherent characteristic passes both the risk-utility test and the consumer expectations test may a manufacturer or seller obtain protection from section 1(b) of the Mississippi Products Liability Act. Hence, even if a product in this class passes the consumer expectations test, it still may be found to be defective under the risk-utility test.[75]

IV. THE STATE OF THE ART DEFENSE

The Mississippi Products Liability Act provides that a manufacturer or seller shall not be liable to the claimant for design defects if the claimant does not prove by a preponderance of the evidence that, at the time the product left the control of the manufacturer or seller: (1) the manufacturer knew or should have known, in light of knowledge reasonably available, of the danger that caused the claimant's harm; (2) the product failed to function as expected; and (3) a feasible design alternative existed that would have, to a reasonable probability, prevented the harm.[76] Each of these requirements will be considered separately.

The first requirement, that the claimant prove that the manufacturer or seller knew or should have known of the danger at the time the product left the manufacturer or seller, requires the claimant to prove that the danger was discoverable under technology existing when the product was made. This requirement is the first aspect of the state of the art defense.[77] Thus, the state of the art defense requires the manufacturer to use the best scientific technology that is practically and economically feasible at the time the product was made or marketed.[78] If the manufacturer complied with the state of the art at the time the product was made or marketed, he can avoid liability for a design defect.[79] This requirement is in accord with existing Mississippi law.[80]

---

[74] *Id.* at 26-27.

[75] *Id.* at 28.

[76] MISS. CODE ANN. § 11-1-63(f)(i)-(ii) (Supp. 1993).

[77] *See infra* note 82 and accompanying text.

The second requirement, that the product fail to function as expected, essentially requires that the claimant prove that the product was in a condition not contemplated by the ultimate consumer. In other words, the claimant must prove that a condition of the product that he did not contemplate caused the harm for which he seeks recovery.

The third requirement, that the claimant prove that a feasible design alternative existed that would have probably prevented the harm, is the second aspect of the state of the art defense. This requirement is in accord with the view of most states, as most courts require that the claimant prove that an alternative design was feasible at the time the product was made or distributed.[81] Additionally, this requirement is in accord with existing Mississippi law.[82] A feasible design alternative is defined by the Mississippi Products Liability Act as "a design that would have to a reasonable probability prevented the harm without impairing the utility, usefulness, practicality or desirability of the product to users or consumers."[83]

V. MANUFACTURING OR CONSTRUCTION DEFECTS

The cause of action based on a manufacturing or construction defect is based on the theory that the manufacturer's product deviated in some material way from the manufacturer's own specifications. A manufacturing or construction defect is simple to identify because the product in question may be compared to other similar products made by the manufacturer. The essence of this cause of action is that the manufacturing defect in the product made the product unreasonably dangerous to the user or consumer.[84] Unlike the theory based on design defects, where the manufacturer is required to conform its products to the best scientific technology that is practically and economically feasible at the time the product was made or marketed, under the theory based on manufacturing defects, the manufacturer is required to conform its product to the standards it has chosen to impose upon itself.[85] This standard may be higher than that required by the industry at the time of the product's manufacture or marketing. If the manufacturer has imposed this standard on itself, the manufacturer will be held to its own standard. This cause of action was recognized in Mississippi prior to the enactment of the Mississippi Products Liability Act.[86] In order to recover in a cause of action based on a manufacturing defect, the plaintiff had to prove that "(1) the plaintiff was injured by the product, (2) the injury resulted from a manufacturing defect which rendered the product unreasonably dangerous, and (3) the defect existed at the time the product left the hands of the manufacturer."[87]

---

[78] WILLIAM L. PROSSER ET AL., TORTS, CASES AND MATERIALS 742 (8th ed. 1990).

[79] *Id.*

[80] *See* Hall v. Mississippi Chemical Express, Inc., 528 So. 2d 796, 799-800 (Miss. 1988) ("On the other hand, our law does not require that every manufacturer incorporate into his product every innovation which twenty-twenty hindsight suggests might have rendered the product more safe (citation omitted). Our law demands that products be reasonably fit, not perfectly so.").

[81] KEETON ET AL., *supra* note 2, at 742.

[82] *See* Toliver v. General Motors Corp., 482 So. 2d 213, 218 (Miss. 1986) ("To prove his case, the plaintiff may introduce evidence of industry standards, to show deviation therefrom, or an alternate design, to show the feasibility thereof.").

[83] MISS. CODE ANN. § 11-1-63(f)(ii) (Supp. 1993).

Manufacturing Defects Under the MPLA

The Mississippi Products Liability Act codifies the cause of action based on a manufacturing defect. [88] The manufacturing defect theory of recovery, like all theories of recovery under the Mississippi Products Liability Act, is similar to existing Mississippi products liability law based on strict liability in tort. As a result, the plaintiff is relieved of proving that the defect occurred through the defendant's negligence or other fault. In order to recover in a products liability action based on a manufacturing defect, the plaintiff must prove by a preponderance of the evidence that, at the time the product left the control of the manufacturer or seller: (1) the product was designed in a defective manner; (2) the defective condition rendered the product unreasonably dangerous to the user or consumer; and (3) that the defective and unreasonably dangerous condition of the product was the proximate cause of the plaintiff's damages.[89]

---

[84] *See, e.g., Toliver*, 482 So. 2d at 218.

[85] RICHARD A. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 68 (1980).

[86] *See State Stove Mfg. Co.*, 189 So. 2d at 121 (recognizing cause of action based on manufacturing defect).

[87] *Toliver*, 482 So. 2d at 216.

[88] *See* MISS. CODE ANN. § 11-1-63(a)(i)(1), (ii), (iii) (Supp. 1993).

VI. FAILURE TO WARN

Another defect that could render a product unreasonably dangerous under Mississippi law is the lack of an adequate warning of a dangerous aspect of the product.[90] Generally, a manufacturer has a duty to warn users and consumers of a product of any possible hazards associated with the product when the manufacturer or seller knows or has reason to know that the product is likely to be dangerous to those who use or consume it, and when there is reason to believe that the user or consumer will not recognize the danger.[91] However, a manufacturer has no duty to warn of a danger that is open and obvious.[92] Moreover, there is no duty to warn if the user knows of the danger.[93] Absent a duty to warn, there can be no liability.

The cause of action for failure to warn may be based on the theory of negligence or strict liability in tort.[94] The strict liability in tort theory is derived from *State Stove Manufacturing Co. v. Hodges*[95] and section 402A of the Restatement

---

[89] *See* MISS. CODE ANN. § 11-1-63(a)(i)(1), (ii), (iii) (Supp. 1993).

[90] *See* Swan v. I.P., Inc., 613 So. 2d 846, 852 (Miss. 1993); Gordon v. Niagara Mach. & Tool Works, 574 F.2d 1182, 1189 (5th Cir. 1978).

[91] *Gordon*, 574 F.2d at 1189.

[92] Harrist v. Spencer-Harris Tool Co., 140 So. 2d 558, 561 (Miss. 1962).

[93] Prodgett v. Jackson Iron & Metal Co., 253 So. 2d 837 (Miss. 1971).

[94] *Gordon*, 574 F.2d at 1189.

[95] 189 So. 2d 113 (Miss. 1966), *cert denied*, 386 U.S. 912 (1967).

(Second) of Torts. The negligence theory is derived from section 388 of the Restatement (Second) of Torts.[96]

In order to recover in a failure to warn cause of action, the plaintiff has to prove that the manufacturer or seller knew or had reason to know of the hazard or risk associated with the product about which it failed to warn.[97] In proving the foregoing, the plaintiff is in effect proving that the defendant was negligent in its failure to warn.[98] Hence, even though the cause of action for failure to warn could be based on negligence or strict liability in tort, the two theories, while conceptually different, often merge into a single breach of duty.[99]

With prescription drugs, the manufacturer may fulfill this duty to warn by warning physicians instead of the ultimate user, as the physician is in the best position to evaluate the needs of the patient along with the risks associated with a particular drug in order to determine the proper treatment of the patient.[100] In this instance, the physician is known as a learned intermediary. If the manufacturer has adequately warned the physician, then the manufacturer is freed from liability.[101] If there is no physician in the role of a learned intermediary, then the manufacturer has a duty to warn the user or consumer.[102]

---

[96] *See Gordon*, 574 F.2d at 1185-86 (grounding negligence theory on section 388 of Restatement (Second) of Torts). Section 388 of the Restatement (Second) of Torts (1965) states:

> Chattel Known to be Dangerous for Intended Use
>
> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

RESTATEMENT (SECOND) OF TORTS § 388 (1964).

[97] For more information on the elements of proof, see *supra* notes 40-49 and accompanying text.

[98] W. Page Keeton, *The Meaning of Defect in Products Liability Law - A Review of Basic Principles*, 45 MO. L. REV. 579, 586 (1980).

[99] *See Gordon*, 574 F.2d at 1190 (holding manufacturer had some duty under strict liability theory and failure to warn theory).

[100] Wyeth Lab., Inc. v. Fortenberry, 530 So. 2d 688, 692 (Miss. 1988).

Although the learned intermediary theory arose in the context of prescription drugs, it has not been limited to prescription drugs. For example, in *Swan v. I.P., Inc.*,[103] the Mississippi Supreme Court applied the theory in a case where the plaintiff, a school teacher, alleged injury as a result of exposure to fumes and spray of polyurethane roofing materials being used to re-roof a junior high school. The theory of recovery against the manufacturer was the alleged failure of the manufacturer to warn of the dangerous fumes. The manufacturer defended by contending that it relied on the roofing contractor to warn the teacher of the dangerous fumes. The trial court granted summary judgment in favor of the manufacturer based on the learned intermediary defense.[104] The Mississippi Supreme Court agreed that the learned intermediary theory was applicable, but reversed because material issues of fact existed as to whether the manufacturer's reliance on the intermediary was reasonable. The court stated that the learned intermediary defense does not relieve the manufacturer of its duty to warn unless the manufacturer's reliance on the intermediary is reasonable.[105]

In a failure to warn case, whether a warning is adequate is a fact question and is therefore usually addressed by the trier of fact.[106] Moreover, an adequate warning is one that is reasonable under the circumstances.[107]

Failure to Warn Under the MPLA

The Mississippi Products Liability Act codifies the cause of action based on lack of an adequate warning about the dangerous aspect of a product.[108] This theory of recovery, like all theories of recovery under the Mississippi Products Liability Act, is similar to existing Mississippi products liability law based on strict liability in tort. As a result, the plaintiff is relieved of proving that the defect occurred through the defendant's negligence or other fault. In order to recover in a products liability action based on a failure to warn, the plaintiff must prove by a preponderance of the evidence that at the time the product left the control of the manufacturer or seller, (1) the product was defective because it failed to contain adequate warnings or instructions; (2) the defective condition rendered the product unreasonably dangerous to the user or consumer; and (3) the defective and unreasonably dangerous condition of the product was the proximate cause of the plaintiff's damages.[109]

---

[101] *Fortenberry*, 530 So. 2d at 692.

[102] *Id.* at 691.

[103] 613 So. 2d 846 (Miss. 1993).

[104] *Swan*, 613 So. 2d at 851.

[105] *Id.* at 855.

[106] *Fortenberry*, 530 So. 2d at 692.

[107] *Id.*

The Act defines an adequate warning or instruction as follows:

> An adequate product warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates sufficient information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to an ordinary consumer who purchases the product. . . .[110]

The Mississippi Products Liability Act also adopts prior law which states that the manufacturer or seller is not liable for failure to warn a user or consumer of a dangerous condition of a product if the claimant does not prove by a preponderance of the evidence that, at the time the product left the control of the manufacturer or seller, the manufacturer or seller knew or had reason to know of the danger that caused the damage, and that the ordinary user or consumer would not recognize the dangerous condition.[111]

---

[108] MISS. CODE ANN. § 11-1-63(a)(1)(2), (a)(ii)-(iii) (Supp. 1993).

[109] MISS. CODE ANN. § 11-1-63(a)(1)(2), (a)(ii)-(iii) (Supp. 1993).

[110] MISS. CODE ANN. § 11-1-63(c)(ii) (Supp. 1993).

[111] *Id.* § 11-1-63(c)(i).

Additionally, the Act adopts the learned intermediary defense which in some circumstances may relieve the manufacturer or supplier of its duty to warn the ultimate user or consumer.[112] The learned intermediary defense applies to prescription drugs, medical devices and other products that are intended to be used only under the supervision of a physician or other licensed professional person.[113] With respect to these products, the Mississippi Products Liability Act defines an adequate warning or instruction as follows:

> An adequate product warning or instruction is one that a reasonable person in the same or similar circumstances would have provided with respect to the danger and that communicates sufficient information on the dangers and safe use of the product . . . taking into account the characteristics of, and the ordinary knowledge common to, a physician or other licensed professional who prescribes the drug, device or other product.[114]

Finally, the Act adopts prior law which states that a manufacturer or seller shall not be liable on a failure to warn theory if the user knew or should have known of the danger or if the danger is open and obvious.[115]

VII. Breach of Warranty

Products liability actions in Mississippi may also be based on a breach of a warranty. Mississippi's warranty provisions[116] were derived from article two of the Uniform Commercial

---

[112] *See supra* notes 100-105 and accompanying text.

[113] Miss. Code Ann. § 11-1-63(c)(ii) (Supp. 1993).

[114] Miss. Code Ann. § 11-1-63(c)(ii) (Supp. 1993).

[115] Miss. Code Ann. § 11-1-63(e) (Supp. 1993). This section states:

> In any action alleging that a product is defective pursuant to paragraph (a)(i)(2) of this section, the manufacturer or seller shall not be liable if the danger posed by the product is known or is open and obvious to the user or consumer of the product, or should have been known or open and obvious to the user or consumer of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons who ordinarily use or consume the product.

Id.

[116] Miss. Code Ann. §§ 75-2-313 to -315 (1972).

Code.[117] The breach of warranty cause of action is closely identified with contract law and not with tort law. Consequently, the Mississippi Supreme Court has not utilized this theory much in its discussions of products liability issues.[118]

Mississippi law has traditionally recognized three types of warranties in transactions between buyers and sellers. The first type is an express warranty which may be made by affirmation, promise, description or sample.[119] The second type is the implied warranty of merchantability.[120] This warranty, which

---

[117] The Uniform Commercial Code was adopted in Mississippi in 1968.

[118] *See infra* notes 132-34 and accompanying text.

[119] Section 75-2-313 of the Mississippi Code provides:

> Express warranties by affirmation, promise, description, sample.
> (1) Express warranties by the seller are created as follows:
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

MISS. CODE ANN. § 75-2-313 (1972).

[120] Section 75-2-314 of the Mississippi Code states:

> Implied warranty: merchantability; usage of trade.
> (1) A warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section, the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
> (2) Goods to be merchantable must be at least such as
> (a) pass without objection in the trade under the contract description; and
> (b) in the case of fungible goods, are of fair average quality within the description; and
> (c) are fit for the ordinary purposes for which such goods are used; and
> (d) run, within the variation permitted by the agreement, or even kind, quality and quantity within each unit and among all units involved; and
> (e) are adequately contained, packaged, and labeled as the agreement may require; and

is implied in a contract of sale between a buyer and seller when the seller is a merchant with respect to goods of the kind sold, warrants that the goods shall be merchantable or fit for the ordinary purpose for which they are sold. The third type of warranty recognized in Mississippi is the implied warranty of fitness for a particular purpose.[121] This warranty is implied in a contract of sale when the seller has reason to know the specific purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment in selecting the goods.

The warranty provisions of the Mississippi Code represent a strict liability approach to products liability.[122] Under these provisions, the product is expected to conform to the quality and fitness standards that were either represented by the manufacturer or seller or imposed by law.[123] Hence, considerations such as the defendant's belief that the warranty was true and

---

> (f) conform to the promises or affirmations of fact made on the container or label if any.
>
> (3) Other implied warranties may arise from course of dealing or usage of trade.
>
> (4) With respect to the sale of cattle, hogs and sheep, there shall be no implied warranty that the cattle, hogs and sheep are free from sickness or disease at the time the sale is consummated, conditioned upon reasonable showing by the seller or his agent that all state and federal regulations pertaining to animal health were complied with.

MISS. CODE ANN. § 75-2-314 (1972).

[121] Section 75-2-315 of the Mississippi Code states:

> Implied warranty; fitness for particular purpose.
>
> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that the goods shall be fit for such purpose. Provided, however, with respect to the sale of cattle, hogs and sheep, there shall be no implied warranty that the cattle, hogs and sheep are free from sickness or disease at the time the same is consummated, conditioned upon a reasonable showing by the seller or his agent that all state and federal regulations pertaining to animal health were complied with.

MISS. CODE ANN. § 75-2-315 (1972).

[122] JEFFREY D. WITTENBERG, PRODUCTS LIABILITY: THE LAW IN MISSISSIPPI § 3-2, at 37 (1982).

[123] *Id.*

whether he was at fault are not relevant to the breach of warranty issue.[124]

When the products liability cause of action is based on breach of a warranty, the plaintiff does not have to prove that the product was unreasonably dangerous. Moreover, privity of contract between the consumer and the manufacturer is not required.[125] Rather, in order to recover in an action based on breach of a warranty, the plaintiff merely has to prove (1) that the warranty was made by the seller or implied by law, (2) that the warranty was false which made the product defective, and (3) that the defect caused the plaintiff's damage.[126]

With products liability actions based on breach of a warranty, the question arises as to whether the claimant must rely on the warranty in order to recover. With the implied warranty of fitness for a particular purpose, reliance is required because this warranty is given only when the buyer is relying on the seller's skill or judgment to select or furnish goods.[127] However, with the implied warranty of merchantability, there is no provision in Mississippi law or in the Uniform Commercial Code that requires reliance in order for the injured party to recover.[128]

However, with express warranties, the answer is not as clear. Express warranties are created when the affirmations of fact, description of the goods or samples become "part of the basis of the bargain."[129] Whether the "basis of the bargain" language means that reliance is required is not clear. With express warranties, there is no specific provision of Mississippi's version of the Uniform Commercial Code which requires reliance. Additionally, whether reliance is required in order to recover for breach of an express warranty has never been addressed by the Mississippi Supreme Court. However, comment three to section 2-313 of the Uniform Commercial Code may provide guidance. It states that "[i]n actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement."[130] These statements, coupled with the fact that section 75-2-313 of the Mississippi Code does not specifically require reliance, tend to show that the buyer need not prove reliance on the seller's representations in order to recover in a products liability based on breach of an express warranty. The buyer need only show that an affirmation of fact or promise was made by the seller. In order to prove that he did not breach an express warranty, the seller has the burden of proving that the affirmation of fact or promise was not part of the basis of the bargain.[131]

---

[124] *Id.*

[125] *See State Stove Mfg. Co.*, 189 So. 2d at 115; MISS. CODE ANN. § 11-7-20 (Supp. 1993).

[126] Crocker v. Sears, Roebuck & Co., 346 So. 2d 921, 923-24 (Miss. 1977).

[127] MISS. CODE ANN. § 75-2-315 (1972).

[128] *See* MISS. CODE ANN. § 75-2-314 (1972) (requiring no proof of reliance for breach of implied warranty theory).

[129] *See supra* note 119.

Even though the warranty provisions have been available to plaintiffs in products liability actions, the justices of the Mississippi Supreme Court have indicated a preference for the theory of strict liability in tort over any of the warranty theories.[132] Moreover, the warranty theories were sometimes

---

[130] U.C.C. § 2-213 cmt. 3 (1990).

[131] *See, e.g.*, Fitzner Pontiac-Buick-Cadillac, Inc. v. Smith, 523 So. 2d 324, 327 (Miss. 1988) (holding buyer could not recover in breach of contract action based on breach of express warranty where statements made by seller of used car were "not part of the basis of the bargain within section 75-2-313(1)(a)" of the Mississippi Code). *But see* ROBERT D. HURSH & HENRY J. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY (2d ed. 1974) (citing several cases holding reliance upon warranty by person who suffered loss necessary in order to recover); *see also* U.C.C. § 2-313 cmt. 1 (1990) (stating in part that express warranties rest on "dickered" aspects of individual bargain).

[132] For example, in *State Stove Mfg. Co.*, the court stated:

> Breach of Warranty is associated with contract law. . . . The idea of a warranty introduces quite unnecessary complications into the liability of a manufacturer to a consumer. In the absence of privity, the liability is in tort and not in contract, and a concept of warranty from the contract law of sales is irrelevant.

State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 118 (Miss. 1989), *cert. denied*, 386 U.S. 912 (1967).

And in *Coca Cola Bottling Co. v. Reeves*, the court stated:

> [A s]trong argument may be made that, with the advent of Section 402A of the Restatement (Second) of Torts and the acceptance into our positive law

seen as unnecessary in light of the availability of the theory of strict liability in tort.[133] As a result, many of the discussions of products liability in Mississippi have focused on strict liability in tort and not breach of warranty.[134]

Breach of Warranty Under the MPLA

The Mississippi Products Liability Act codifies the cause of action based on breach of an express warranty.[135] As a result, the plaintiff is relieved of proving that the defect occurred through the defendant's negligence or other fault. In order to recover in a products liability action based on breach of an express warranty, the plaintiff must prove by a preponderance of the evidence that at the time the product left the control of the manufacturer or seller: (1) an express warranty or other express factual representation upon which the claimant justifiably relied in electing to use the product was made; (2) the warranty or other factual representation was breached or false which made the product defective; (3) the defective condition rendered the product unreasonably dangerous to the

---

> of the doctrine of strict liability in tort, the breach of implied warranty theory of a products liability action should be relegated to the status of an important historical development in products liability law, wholly supplanted by strict liability in tort. *But see* MISS. CODE ANN. § 75-2-715(2) (1972).
>
> Eschewing these notions, however, plaintiffs continued to sue on the alternative theories of strict liability in tort and breach of implied warranty. Particularly in a case such as this a plaintiff creates unnecessary legal complications in a lawsuit and creates substantial danger of reversal when he determines that he must kill the snake more than once.

Coca Cola Bottling Co. v. Reeves, 486 So. 2d 374, 383 (Miss. 1986).

[133] *See Reeves*, 486 So. 2d at 383.

[134] However, there are a number of cases where the breach of warranty theories were discussed. *See, e.g.,* Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 290-92 (5th Cir. 1975) (discussing whether express and implied theories of liability were permitted by Mississippi's wrongful death statute); Brown v. Williams, 504 So. 2d 1188, 1191 (Miss. 1987) (holding no breach of express or implied warranty for manufacturer of oil drilling equipment); McLaurin v. Smith's Poultry & Farm Supply, 499 So. 2d 1361, 1364 (Miss. 1986) (recognizing existence of express warranty theory, implied warranty of merchantability theory, and implied warranty of fitness for particular purpose theory); Cocker v. Sears, Roebuck & Co., 346 So. 2d 921, 923 (Miss. 1977) (holding defect in product must cause damage regardless of whether claim is based on tort or warranty).

[135] MISS. CODE ANN. § 11-1-63(a)(i)(4), (a)(ii)-(iii) (Supp. 1993).

user or consumer, and (4) the defect was the proximate cause of the claimant's damages.[136]

By the express language of the Mississippi Products Liability Act, in order to recover in an action based on breach of an express warranty, the claimant has to prove that the defective condition of the product rendered the product unreasonably dangerous to the user or consumer.[137] This was not a requirement under prior law.[138] By requiring the claimant in a breach of express warranty cause of action to prove that the defective condition of the product rendered the product unreasonably dangerous to the user or consumer, the Act is imposing an additional requirement on the claimant that did not exist under prior law. This additional requirement will increase the claimant's burden of proof, making it more difficult for claimants to utilize this theory of recovery.

Another change brought about by the Act is that in order to recover in a products liability action based on breach of an express warranty or other express factual representation about the product, the claimant must prove that he justifiably relied on the express warranty or other express factual representation.[139] With express warranties based on section 75-2-313 of the Mississippi Code, however, reliance was not required; the only requirement was that the express warranty become "part of the basis of the bargain."[140] This requirement may increase the claimant's burden of proof in actions based on breach of an express warranty.

Prior Mississippi law recognized products liability actions based on breach of an express warranty, breach of an implied warranty of merchantability and breach of an implied warranty of fitness for a particular purpose.[141] However, the Act only specifically recognizes products liability causes of action based on breach of express warranties. The Act does not specifically recognize products liability causes of action based on breach of implied warranties. Additionally, the Mississippi Products Liability Act fails to address whether the warranty provisions of the Mississippi Uniform Commercial Code[142] are repealed. The writer suggests that since the Mississippi Products Liability Act does not amend or repeal these provisions, they are still valid. These issues will no doubt be addressed by Mississippi courts in the future.

---

[136] MISS. CODE ANN. § 11-1-63(a)(i)(4), (a)(ii)-(iii) (Supp. 1993).

[137] MISS. CODE ANN. § 11-1-63(a)(ii) (Supp. 1993).

[138] *See supra* notes 124-25 and accompanying text.

[139] MISS. CODE ANN. § 11-1-63(a)(i)(4) (Supp. 1993).

[140] *See supra* notes 128-30 and accompanying text.

[141] *See supra* notes 117-20 and accompanying text.

VIII. DAMAGES RECOVERABLE IN A PRODUCTS LIABILITY ACTION

Since the Mississippi Supreme Court's decision in *State Stove Manufacturing Co. v. Hodges*,[143] strict liability in tort has become the dominant theory of recovery in products liability actions in Mississippi. Generally, in order to recover in a products liability action based on strict liability in tort, the plaintiff must have sustained physical harm to his person or to his property.[144] If the plaintiff sustains only economic loss because of harm to the product itself, because he did not receive what he contracted for or because of increased costs or lost profits due to the damaged product, his remedy is not an action based on products liability, but an action based on breach of contract or breach of warranty.[145] This is because, historically, economic damages have not generally been recoverable in tort actions: such damages have only been recoverable in breach of warranty actions.[146]

---

[142] MISS. CODE ANN. §§ 75-2-313 to -315 (1972).

[143] 189 So. 2d 113 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967).

[144] *See* East Miss. Elec. Power Ass'n v. Porcelain Prods. Co., 729 F. Supp. 512, 514-515 (S.D. Miss. 1990); Section 402A of the Restatement (Second) of Torts, which has been adopted in Mississippi, states in part:

> Special Liability of Seller of Product for Physical Harm to User or Consumer - (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, ...
> RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[145] *See* East River Steamship Corp. v. Transamerica Delaval, 476 U.S. 858, 872 (1986) ("Damage to a product itself is most naturally understood as a warranty claim. Such damage means simply that the product has not met the consumer's expectations, or, in other words, that the customer has received 'insufficient product value.' . . . The maintenance of product value and quality is precisely the purpose of express and implied warranties. . .there, a claim of a nonworking product can be brought as a breach-of-warranty action. Or, if the customer prefers, it can reject the product or

The law of sales is designed to govern the economic relations between suppliers and consumers of goods.[147] Consequently, Mississippi's version of the Uniform Commercial Code should govern claims for economic loss. The doctrine of strict liability in tort is designed to govern the distinct problem of physical injuries to persons and property.[148] Allowing claimants to assert tort claims for economic loss only "would undermine the warranty remedies provided by the Mississippi Commercial Code and unacceptably broaden the manufacturer's exposure to damages."[149] This view is in accord with the generally accepted view that where the purchaser complains that a product has not functioned as expected and intended, contract law and the law of warranty are more appropriate than tort law.[150]

In a products liability action based on negligence or strict liability in tort, the plaintiff may recover personal injury or property damages that are proximately caused by the defective condition of the product.[151] When the defective product has

---

revoke its acceptance and sue for breach of contract.") (citations omitted); East Miss. Elec. Power Ass'n v. Porcelain Prods. Co., 729 F. Supp. 512 (S.D. Miss. 1990) (concluding that plaintiffs could not recover under strict liability in tort where warranty remedy applied); W. PAGE KEETON ET AL., *supra* note 2, § 101, at 709.

This issue has not been addressed by the Mississippi Supreme Court.

[146] KEETON ET AL., *supra* note 2, § 101.

[147] *East Miss. Electric Power Ass'n*, 729 F. Supp at 514.

[148] *Id.* at 515.

[149] *Id.* at 517; *see supra* note 145.

[150] KEETON ET AL., *supra* note 2, § 101.

[151] Juries in Mississippi are allowed to consider four elements of damages in personal injury actions:

> (1) The type of injuries to the plaintiff, if any, and the length of their duration;
> (2) Past, present and future physical pain and suffering and resulting mental anguish, if any;
> (3) Reasonable medical expenses incurred and those that are reasonably certain to be incurred in the future, if any;
> (4) Any future disability that is reasonably certain to occur if any, its duration and its effect, if any, on [the plaintiff's] future [earnings/earning capacity]. In arriving at the amount of your award, if any, for any loss of future [earn-

caused death, the plaintiff may recover damages under the Mississippi Wrongful Death Act.[152]

When a claimant seeks to recover economic loss based on breach of a warranty, he may recover for any economic loss that he has suffered as well as for any personal injury and property damage that he has sustained.[153] The personal injury and property damages may be recovered as consequential damages in the warranty action.[154]

Recoverable Damages Under the MPLA

The Mississippi Products Liability Act basically codifies existing Mississippi law on the damages recoverable in a products liability action. The Act begins with the phrase "[i]n any action for damages caused by a product except for commercial damage to the product itself . . . ."[155] This phrase indicates that claims for commercial damage to the product itself may not

---

> ings/earning capacity], you should consider what the plaintiff's health, physical ability, age, and earning power or capacity were before the injury and the effect of the plaintiff's injuries, if any upon them.

James Brady, Comment, *Hedonic Damages*, 59 MISS. L.J. 495, 502 (1989) (citing MISS. MODEL JURY INSTR. 20.14 (1979)).

Since *State Stove Mfg. Co.*, plaintiffs have been able to recover for property damage proximately caused by a defective product. *See, e.g.,* Hamilton Fixture Co. v. Anderson, 285 So. 2d 744 (Miss. 1973) (allowing plaintiffs to recover for damage to house caused by defective humidifier).

[152] MISS. CODE ANN. § 11-7-13 (Supp. 1993); *see infra* notes 252-98 and accompanying text.

[153] WITTENBERG, *supra* note 122, at 27.

[154] *Id.* Section 75-2-15(2) of the Mississippi Code states:

> Consequential damages resulting from the seller's breach include:
> (a) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise: and
> (b) Injury to person or property proximately resulting from any breach of warranty.

MISS. CODE ANN. § 75-2-15(2) (1972); *see* R. Clinton Constr. Co. v. Bryant & Reeves, Inc. 442 F. Supp. 838, 839 (N.D. Miss. 1977) (allowing buyer to recover purchase price and consequential damages where seller breached express warranty supplying defective anti-freeze); Ralston Purina Co. v. Howell, 254 So. 2d 911, 913-14 (Miss. 1971) (allowing buyer to recover price of dead hogs in implied warranty action where seller sold defective hog feed causing death of 111 hogs).

[155] MISS. CODE ANN. § 11-1-63 (Supp. 1993).

be recovered under the Act. Those claims will have to be brought in a breach of warranty action under Mississippi's version of the Uniform Commercial Code. Furthermore, it would appear that where a product damages itself and causes only economic loss without accompanying physical injury to person or property, the claimant must likewise bring a breach of warranty action under Mississippi's version of the Uniform Commercial Code.

When the product causes physical injury to person or property, the cause of action is properly brought under the Mississippi Products Liability Act. However, there is nothing to prevent a claimant from recovering personal injury or property damages in a warranty action under Mississippi's version of the Uniform Commercial Code. Hence, when a claimant has suffered economic loss resulting from a breach of a warranty, the claimant may recover for the economic loss as well as for any accompanying personal injury or property damages. The personal injury and property damages will be considered consequential damages.[156]

Although the Mississippi Products Liability Act is available as a remedy for claimants who are injured by a product, warranty law still provides an effective remedy for such claimants. Moreover, since claimants may join claims under the Act and Mississippi's version of the Uniform Commercial Code in the same action, injured claimants are assured of effective means of recovery once the claims are proven. However, claimants should be careful not to seek to recover economic damages under the Mississippi Products Liability Act.[157]

---

[156] MISS. CODE ANN. § 75-2-715 (1972). This section of the Code was amended by the Mississippi Products Liability Act to read as follows:

> (2) Except as otherwise provided in House Bill No. 1270, 1993 Regular Session, consequential damages resulting from the seller's breach include:
>
> (a) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
>
> (b) Injury to person or property proximately resulting from any breach of warranty.

Id.

IX. ARE PUNITIVE DAMAGES RECOVERABLE IN PRODUCTS LIABILITY ACTIONS?

The Mississippi Supreme Court has generally recognized that punitive damages may be awarded in civil actions in Mississippi under certain circumstances. Punitive damages are those damages which are awarded in addition to actual or compensatory damages, and are granted in order to punish the wrongdoer and to set an example so that others may be deterred from the commission of similar offenses.[158] Such damages are awarded to the injured party as a public service for bringing the wrongdoer to account.[159] Because a primary purpose of the law is to protect the customer, punitive damages are an important aspect of the remedial side of the law.[160] However, punitive damages are not awarded in every civil action; they are awarded only in extreme cases.[161] They may only be assessed against a party for malice, a willful and intentional wrong, or for such gross or reckless negligence equivalent to such a wrong.[162] Moreover, Mississippi's system of awarding punitive damages has been held to be constitutional.[163]

---

[157] *See, e.g., East Miss. Elec. Power Ass'n*, 729 F. Supp. at 513 (holding that breach of warranty, not strict liability or negligence, is proper basis for claim of economic damage in products liability action).

[158] *See* Standard Life Ins. Co. v. Veal, 354 So. 2d 239, 247 (Miss. 1977).

[159] *Veal*, 354 So. 2d at 247.

[160] Bankers Life & Casualty Co. v. Crenshaw, 483 So. 2d 254, 278 (Miss. 1985), *aff'd*, 486 U.S. 71 (1988).

[161] Gardner v. Jones, 464 So. 2d 1144, 1149 (Miss. 1985).

[162] *Gardner*, 464 So. 2d at 1149 (citing Seals v. St. Regis Paper Co., 236 So. 2d 388, 392 (Miss. 1970)); *see also* Fowler Butane Gas Co. v. Varner, 141 So. 2d 226, 233 (Miss. 1962) (holding that "[i]n order to warrant the recovery of punitive damages, there must enter into the injury some element of aggression or some coloring of insult, malice or gross negligence, evincing ruthless disregard for the rights of others, so as to take the case out of the ordinary rule").

[163] *See* Ivy v. General Motors Acceptance Corp., 612 So. 2d 1108, 1115-16 (Miss. 1992).

The trial judge, in determining whether the issue of punitive damages should be submitted to the jury, must decide whether, under the totality of the circumstances and viewing the defendant's conduct in the aggregate, a hypothetical trier of fact could find either malice, gross negligence or reckless disregard.[164] If the judge answers this question in the affirmative, the issue is submitted to the jury. The award of punitive damages is within the discretion of the jury, which has wide latitude in determining whether punitive damages should be granted and, if so, the amount of those damages.[165] The amount awarded by the jury cannot be determined by any fixed rule.[166] However, in order to recover punitive damages, the plaintiff must have suffered actual damages.[167] Generally, the jury's determination will remain undisturbed, and an award will only be vacated or reduced for exceptional reasons.[168] Such exceptional reasons may include instances where the amount is arbitrary or unreasonable, where it is against the overwhelming weight of the evidence or where it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience of the court.[169] Factors to be taken into account by the jury in determining the amount of punitive damages are:

> (1) Such amount as is necessary for the punishment of the wrongdoing of the defendant and deterring defendant from similar conduct in the future . . .

---

[164] Wirtz v. Switzer, 586 So. 2d 775, 783 (Miss. 1991).

[165] McGowan v. Estate of Wright, 524 So. 2d 308, 310 (Miss. 1988); South Central Bell v. Epps, 509 So. 2d 886 (Miss. 1987).

[166] Commodore Corp. v. Bailey, 393 So. 2d 467, 471 (Miss. 1981).

[167] Snow Lake Shores Property Owners Corp. v. Smith, 610 So. 2d 357 (Miss. 1992); T.G. Blackwell Chevrolet Co. v. Eshee, 261 So. 2d 481, 485 (Miss. 1972).

[168] Andrew Jackson Life Ins. Co. v. Williams, 566 So. 2d 1172, 1190 (Miss. 1990). Section 11-1-55 allows the trial judge or justice of the Mississippi Supreme Court to "overrule a motion for new trial or affirm on direct or cross appeal, upon condition of an additur or remittitur, if the court finds that the damages are excessive or inadequate for the reason that the jury or trier of the facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence. If such additur or remittitur be not accepted then the court may direct a new trial on damages only." MISS. CODE ANN. § 11-1-55 (1972).

[169] *See Williams*, 566 So. 2d at 1190-91 and cases cited therein.

> (2) Such amount as is reasonably necessary to make an example of the defendant so that others may be deterred from the commission of similar offenses . . . [and]
>
> (3) The pecuniary ability or financial worth of the defendant . . . .[170]

In order for a plaintiff to recover punitive damages, the jury must find by a preponderance of the evidence that the requisite misconduct has been demonstrated.[171] In reviewing punitive damage awards, the Mississippi Supreme Court has shown a great reluctance to interfere with the jury's assessment of the amount of punitive damages awarded.[172] Where proof is sufficient to sustain an assessment of punitive damages, the award is subject to the same scope of review exercised by the court in reviewing verdicts generally.[173]

The foregoing general principles regarding the recovery of punitive damages apply to any civil action brought in Mississippi,[174] including actions based on products liability. In products liability actions based on negligence, the issue of whether punitive damages may be recovered should not be controversial. The only issue should be whether the claimant has proven the requisite gross negligence or reckless conduct by a preponderance of the evidence.[175]

A more controversial issue is whether a claimant may recover punitive damages in a products liability action based on strict liability in tort. The Mississippi Supreme Court has never addressed this issue.[176] However, the United States Court of Appeals for the Fifth Circuit addressed this issue in *Jackson v. Johns-Manville Sales Corporation*[177] after the Mississippi Supreme Court declined certification.[178] The argument against the imposition of punitive damages in products liability cases based on strict liability in tort is that punitive damages are awarded only after a showing of intentional misconduct or gross negligence by the defendant, and since strict liability in tort focuses not on the conduct of a party but on the product itself, such damages are conceptually inconsistent with strict liability in tort and should not be awarded. The court in *Jackson* considered this argument and rejected it as fundamentally flawed.[179] The court concluded that a claimant in a products liability action based on strict liability in tort may recover punitive damages upon sufficient proof. The court reasoned that the bases for recovery for strict liability and punitive damages are independent concepts; the focus of one is redistribution of loss and the focus of the other is punishment. Hence, nothing prevents a claimant from proving a cause of action for strict liability in tort by focusing on the product in order to recover compensatory damages, and then proving that the conduct of the defendant was intentional, outrageous or grossly negligent in order to recover punitive damages.[180] If the claimant has met his burden of proof on both these issues, he should be allowed to recover on both.[181] Therefore, it appears that before the passage of the Mississippi Products Liability Act, a claimant could recover punitive damages in any products liability action as long as he met the requisite burden of proof.

---

[170] *Crenshaw*, 483 So. 2d at 278.

[171] *Williams*, 566 So. 2d at 1188; Seismic Petroleum Serv., Inc. v. Ryan, 450 So. 2d 437, 441 (Miss. 1984); Gaylords of Meridian, Inc. v. Sicard, 384 So. 2d 1042, 1044 (Miss. 1980).

[172] Gardner v. Jones, 464 So. 2d 1144, 1150 n.5 (Miss. 1985); Reserve Life Ins. Co. v. McGee, 444 So. 2d 803, 812 (Miss. 1983); Snowden v. Osborne, 269 So. 2d 858, 861 (Miss. 1972).

[173] *Gardner*, 464 So. 2d at 1150 n.5.

[174] In Mississippi, the law regarding what must be proved by a plaintiff before the issue of the assessment of punitive damages may be submitted to the jury is no different in one case than another. Blue Cross & Blue Shield v. Maas, 516 So. 2d 495, 497 (Miss. 1987); Transport Indem. Co. v. Scott, 513 So. 2d 889, 896-97 (Miss. 1986).

[175] *See supra* notes 159-62 and accompanying text.

---

[176] The Mississippi Supreme Court had an opportunity to address this issue when the question was certified to the court by the United States Fifth Circuit Court of Appeals. However, the Mississippi Supreme Court declined certification without discussion. Jackson v. Johns-Manville Sales Corp., 469 So. 2d 99 (Miss. 1985); Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 396 (5th Cir.), *cert. denied*, 478 U.S. 1022 (1986).

[177] 781 F.2d 394 (5th Cir.), *cert. denied*, 478 U.S. 1022 (1986).

[178] *See supra* note 176.

[179] *Jackson*, 781 F.2d at 399.

[180] *Id.*

[181] *Id.*

Punitive Damages Under the MPLA

The Mississippi Products Liability Act codified existing Mississippi law regarding the awarding of punitive damages in products liability actions. The Act allows a claimant in any products liability action to recover punitive damages.[182] The Mississippi Products Liability Act, in addition to providing a detailed procedure that must be followed before a claimant is allowed to recover punitive damages, makes several changes to Mississippi law. One change is that in order to recover punitive damages, the claimant must prove the requisite defendant's conduct by clear and convincing evidence.[183] Under prior law, the claimant had to prove the requisite defendant's conduct by a preponderance of the evidence.[184] Another change brought about by the Act is that there must be a determination of punitive damages in the second phase of a bifurcated trial. In order to recover punitive damages, the claimant must first prove compensatory damages. In a subsequent evidentiary hearing before the same trier of fact, the claimant must prove that he is entitled to punitive damages. Before the enactment of the Mississippi Products Liability Act, both compensatory and punitive damages were determined in the same hearing.[185] A third change brought about by the Act is that the trial judge, before entering judgement for an award of punitive damages, must ascertain that the award is reasonable in its amount and rationally related to the purpose of punishment and deterrence. Prior to the effective date of the Mississippi Products Liability Act, the jury was given wide discretion in determining the priority and amount of punitive damages, with the trial judge only reviewing the award for reasonableness. These changes to the procedure for recovering punitive damages in products liability actions will mean increased scrutiny of evidence in such actions as well as insulating punitive damages from successful due process challenges.[186]

---

[182] MISS. CODE ANN. § 11-1-63 (Supp. 1993).

[183] MISS. CODE ANN. § 11-1-63 (Supp. 1993).

[184] *See supra* note 171 and accompanying text.

[185] However, even prior to the Mississippi Products Liability Act, the trial judge had the discretion to order a bifurcated hearing on the issues of compensatory and punitive damages, pursuant to Rule 42(b) of the Mississippi Rules of Civil Procedure. Under this rule, the judge has the discretion to order a separate trial on any claim or separate issue or of any number of claims or issues. MISS. R. CIV. P. 42(b).

To recover punitive damages in a products liability action under the Mississippi Products Liability Act, the claimant must "prove by clear and convincing evidence that the defendant acted with malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed fraud."[187] By requiring the claimant to prove the defendant's conduct by clear and convincing evidence, the Legislature is increasing the claimant's quantum of proof because the clear and convincing evidence standard is a standard of persuasion higher than the ordinary preponderance of the evidence standard.[188] Quantum of proof standards reflect the degree of confidence that our legal system demands for particular findings - they measure our willingness to risk error.[189]

Proof by a "preponderance of the evidence" means that the fact-finder must believe that the facts asserted are more probably true than false,[190] whereas "clear and convincing evidence" means that the evidence must establish that the truth of the facts asserted is highly probable.[191] The clear and convincing evidence standard is an intermediate standard which is considered to be an elevated civil or quasi-criminal standard. It lies between a preponderance of the evidence standard, which is the standard applied in most civil cases, and the "beyond a reasonable doubt" standard, which is the standard applied in criminal cases.[192]

---

[186] John G. Corlew, *Punitive Damages After House Bill 1270* 18, 19, a paper delivered for the Mississippi Bar Summer School For Lawyers in Biloxi, Mississippi (July 19, 1993) (available at Mississippi Bar Center, Jackson, Miss.).

[187] MISS. CODE ANN. § 11-1-65(1)(a) (Supp. 1993).

[188] McClendon v. State, 539 So. 2d 1375, 1377 (Miss. 1989).

[189] McGory v. Allstate Ins. Co., 527 So. 2d 632, 638 (Miss. 1988).

[190] EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE § 399 (3d ed. 1984).

[191] *Id.* at 959-60.

[192] *Id.* at 962.

The clear and convincing evidence standard is commonly applied in Mississippi in cases involving fraud,[193] civil arson,[194] disciplinary proceedings,[195] defamation actions brought by public officials,[196] and civil contempt of court.[197] It has been generally recognized by the Mississippi Supreme Court that reversible error results when the trial judge applies an erroneous legal standard, as when the clear and convincing evidence standard is erroneously applied for the preponderance of the evidence standard or vice versa.[198]

In order to recover punitive damages under the Mississippi Products Liability Act, the trier of fact must first determine whether an award of compensatory damages is appropriate and the amount thereof before addressing the issue of punitive damages.[199] This requirement also existed prior to the Act.[200] Only after the finder of fact has determined that an award of compensatory damages is appropriate may the trial judge commence an evidentiary hearing to determine whether punitive damages may be considered. After this determination by the trial judge, the same trier of fact then determines whether to award punitive damages and in what amount.[201]

At the evidentiary hearing for the determination of punitive damages, the trier of fact is instructed that the primary purpose of punitive damages is to punish the defendant and to deter similar misconduct in the future by the defendant and others similarly situated, while the purpose of compensatory damages is to make the plaintiff whole.[202] The Mississippi Products Liability Act lists the following considerations to be taken into account by the trier of fact in determining the amount of punitive damages to be awarded:

---

[193] Mississippi law requires that a party alleging fraud must prove his charge by clear and convincing evidence. *See, e.g.*, McGory v. Allstate Ins. Co., 527 So. 2d 632, 638 (Miss. 1988); Beck Enters., Inc. v. Hester, 512 So. 2d 672, 675 (Miss. 1987); Cherry v. Anthony, 501 So. 2d 416, 420 (Miss. 1987); Johnson v. Brewer, 427 So. 2d 118, 126 (Miss. 1983).

[194] *McGory*, 527 So. 2d at 638.

[195] Walls v. Mississippi State Bar, 437 So. 2d 30, 32 (Miss. 1983); Levi v. Mississippi State Bar, 436 So. 2d 781 (Miss. 1983).

[196] Stegall v. WTWV, Inc., 609 So. 2d 348, 351 (Miss. 1992).

[197] Masonite Corp. v. International Woodworkers of America, 206 So. 2d 171, 180 (Miss. 1967).

[198] McClendon v. State, 539 So. 2d 1375, 1377 (Miss. 1989).

[199] MISS. CODE ANN. § 11-1-65(1)(b) (Supp. 1993).

[200] *See supra* note 167 and accompanying text.

[201] MISS. CODE ANN. § 11-1-65(1)(d) (Supp. 1993).

> [T]he defendant's financial condition and net worth; the nature and reprehensibility of the defendant's wrongdoing, for example, the impact of the defendant's conduct on the plaintiff, or the relationship of the defendant to the plaintiff; the defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm; the duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct; and any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages.[203]

The bifurcated proceeding should eliminate the possibility that the jury might confuse its duty to determine compensatory damages and punitive damages. This process, which allows the jury to render separate verdicts, should keep the issues of compensatory damages and punitive damages separate and distinct, thereby reducing the possibility of confusion and inconsistency. Moreover, the bifurcated process provides an additional safeguard against arbitrary verdicts. Additionally, the use of a bifurcated proceeding should insure that all parties receive a fair trial.

After the trier of fact has determined the amount of punitive damages to be awarded, the trial judge must determine that the award is reasonable in its amount and rationally related to the purpose of punishment and deterrence.[204] The Mississippi Products Liability Act provides factors to be considered by the trial judge in making this determination. These factors are:

> 1. Whether there is a reasonable relationship between the punitive damage award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred;

---

[202] MISS. CODE ANN. § 11-1-65(1)(e) (Supp. 1993).

[203] MISS. CODE ANN. § 11-1-65(1)(e) (Supp. 1993).

[204] MISS. CODE ANN. § 11-1-65(1)(f)(i) (Supp. 1993).

> 2. The degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;
> 3. The financial condition and net worth of the defendant; and
> 4. In mitigation, the imposition of criminal sanctions on the defendant for its conduct and the existence of other civil awards against the defendant for the same conduct.[205]

Prior law was not as specific in detailing the factors to be considered by the trial judge in determining the reasonableness of the jury's award. The specificity provided by the Mississippi Products Liability Act is another safeguard to ensure that the award is not arbitrary and capricious.

The Mississippi Products Liability Act further provides that a seller of a product other than the manufacturer shall not be liable for punitive damages unless the seller either 1) exercised control over the product's design, manufacture, testing or marketing; 2) altered or modified the product; 3) had actual knowledge of the defective condition of the product at the time it supplied the product; or 4) made an express factual representation about the aspect of the product which caused the claimant's harm.[206] This provision is an attempt to insulate the seller who is a mere conduit in the chain of distribution of a product from liability. Even though such a seller no longer is immune from liability as was the case under previous law,[207] he is immune from liability for punitive damages.

There are three types of actions that are not affected by the provisions of the Mississippi Products Liability Act pertaining to punitive damages. With regards to these actions, the Mississippi Products Liability Act states, "(2) The provisions of Section 2 of this Act shall not apply to: (a) Contracts; (b) Libel and slander; or (c) Causes of action for persons or property arising out of asbestos."

Section 2 thus leaves unchanged the law of Mississippi regarding one's ability to recover punitive damages in a breach of contract action. Generally, punitive damages are not recoverable in a breach of contract action.[208] However, punitive damages are recoverable in a breach of contract action where the breach results from an intentional wrong, insult or abuse as well as from such gross negligence as constitutes an individual tort.[209] Moreover, in order to recover punitive damages in a breach of contract action, the plaintiff is not required to prove the defendant's intentional wrong or gross negligence by clear and convincing evidence; proof by a preponderance of the evidence will suffice.[210] Additionally, the use of a bifurcated proceeding is not required.

---

[205] MISS. CODE ANN. § 11-1-65(1)(f)(ii) (Supp. 1993).

[206] MISS. CODE ANN. § 11-1-65(1)(g) (Supp. 1993).

[207] *See infra* notes 299-306 and accompanying text.

Further, section 2 leaves unchanged the law regarding the ability of a claimant in a defamation action in Mississippi to recover punitive damages. Under the Mississippi Products Liability Act, the claimant must prove that he is entitled to recover compensatory damages before he is allowed to recover punitive damages. However, Mississippi law allows a claimant in some defamation actions to recover punitive damages without recovering actual damages.[211] These instances are in cases where the defamatory statements or words are actionable per se. Under these circumstances, it is generally held that punitive damages may be awarded even though no actual damages are awarded, because in such cases, the requirement of a showing of actual damages as the basis of an award of punitive damages is satisfied by the presumption of injury which arises from a showing of libel or slander that is actionable per se. The rationale of this rule is that the defendant must have committed a tortious act before punitive damages can be assessed.[212] Where the defamation is not actionable per se, punitive damages cannot be allowed unless either general or special damage is shown.[213]

---

[208] *See generally* Eselin-Bullock & Assoc. Ins. Agency, Inc. v. National Gen. Ins. Co., 604 So. 2d 236 (Miss. 1992).

[209] Weems v. American Sec. Ins. Co., 486 So. 2d 1222, 1226 (Miss. 1986); Bankers Life & Casualty Co. v. Crenshaw, 483 So. 2d 254, 269 (Miss. 1985); Consolidated Am. Life Ins. Co. v. Toche, 410 So. 2d 1303, 1304-05 (Miss. 1982); Gulf Guar. Life Ins. Co. v. Kelley, 389 So. 2d 920, 922 (Miss. 1980); Aetna Casualty & Surety Co. v. Steele, 373 So. 2d 797, 801 (Miss. 1979); Bellefonte Ins. Co. v. Griffin, 358 So. 2d 387, 391 (Miss. 1978); New Hampshire Ins. Co. v. Smith, 357 So. 2d 119, 121 (Miss. 1978); Lincoln Nat'l Life Ins. Co. v. Crews, 341 So. 2d 1321, 1322 (Miss. 1977); Progressive Casualty Ins. Co. v. Keys, 317 So. 2d 396, 398 (Miss. 1975).

[210] Andrew Jackson Life Ins. Co. v. Williams, 566 So. 2d 1172, 1188 (Miss. 1990).

[211] Newsom v. Henry, 443 So. 2d 817, 823 (Miss. 1983); Wells v. Branscome, 74 So. 2d 743, 749 (Miss. 1954); Jefferson v. Bates, 118 So. 717, 718-19 (Miss. 1928).

Finally, section 2 leaves unchanged the law of Mississippi regarding the ability of a claimant to recover punitive damages against manufacturers or sellers of asbestos related products.[214] Although the Mississippi Supreme Court has never addressed this issue, it was addressed by the Fifth Circuit Court of Appeals in *Jackson v. Johns-Manville Sales Corporation.*[215] In *Jackson*, the Fifth Circuit, interpreting Mississippi law, found that a claimant who had contracted asbestosis may recover punitive damages in a products liability action brought against the asbestos manufacturer. The court rejected the manufacturer's arguments that punitive damages are not available in mass tort cases such as those filed against asbestos manufacturers. The asbestos manufacturer asserted that since punitive damages serve to punish defendants, punitive damages should not be allowed in mass tort cases because, as a result of the voluminous asbestos litigation, asbestos manufacturers have been punished enough. Additionally, the manufacturer asserted that if punitive damages are awarded in mass tort cases, such multiple punitive damage awards might preclude future claimants from recovering even compensatory damages.[216] The court, finding no Mississippi case law on the mass tort issue, looked to the jurisprudence of other states in deciding this issue. Upon finding that virtually every court in other states that had considered the issue had rejected similar arguments and had allowed claimants to recover punitive damages, the court rejected both of the manufacturer's arguments and found that the claimant could recover punitive damages after sufficient proof. Sufficient proof mandates that the plaintiff prove by a preponderance of the evidence that the defendant's conduct was malicious or amounted to a willful and intentional wrong or such gross negligence and recklessness equivalent to such a wrong.[217] Additionally, the plaintiff does not have to prove the defendant's conduct by clear and convincing evidence; proof by a preponderance of the evidence is sufficient. Moreover, both compensatory and punitive damages are recovered in the same proceeding; a bifurcated proceeding is not required.[218]

---

[212] *Newsom*, 443 So. 2d at 824.

[213] *Id.*

[214] MISS. CODE ANN. § 11-1-65 (Supp. 1993).

[215] 781 F.2d 394 (5th Cir. 1986). In *Jackson*, the United States Court of Appeals for the Fifth Circuit addressed this issue after the Mississippi Supreme Court declined certification without discussion. Jackson v. Johns-Manville Sales Corp., 469 So. 2d 99 (Miss. 1985).

[216] *Jackson*, 781 F.2d at 403.

It now appears that claimants who bring products liability actions because of injuries caused by asbestos will have less difficulty collecting punitive damages than will claimants in other types of products liability actions. However, this lower burden of proof and lack of a bifurcated proceeding may make the recovery of punitive damages in these types of cases more susceptible to due process challenges.

X. WHAT DEFENSES ARE AVAILABLE IN PRODUCTS LIABILITY ACTIONS IN MISSISSIPPI?

There were several defenses available to defendants in products liability actions in Mississippi before the passage of the Mississippi Products Liability Act. Such defenses were contributory negligence, assumption of risk and the plaintiff's misuse or abnormal handling of the product. These defenses are also available under the Mississippi Products Liability Act.

---

[217] *Id.* at 404. For a detailed discussion of the plaintiff's burden of proof, see *supra* notes 187-98 and accompanying text. In order to recover punitive damages in asbestos related products liability actions, the plaintiff has the same burden of proof that existed before the Mississippi Products Liability Act.

[218] Another possible interpretation of section 2(2) of the Act is that claimants in products liability actions arising out of asbestos may not recover punitive damages at all. One may argue that because the Act does not apply to "[c]auses of action for person and property arising out of asbestos," claimants in such actions may not recover punitive damages, only compensatory damages. MISS. CODE ANN. § 11-1-65(2)(c) (Supp. 1993). This ambiguity in the Act will have to be decided by the Mississippi courts.

Since Mississippi adopted a pure form of comparative fault,[219] contributory negligence has not been a complete bar to plaintiff's recovery in any type of products liability action brought in Mississippi. Section 11-7-15 of the Mississippi Code states in part that "the fact that the person injured . . . . may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured . . ." What is meant by contributory negligence is "conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection."[220] More specifically, contributory negligence refers to the plaintiff's failure to discover the defect in the product or to guard against the possibility of its existence. In a products liability action based on negligence, when the plaintiff was contributorily negligent, his recovery was simply reduced by his percentage of fault.

In a products liability action based on strict liability in tort, contributory negligence was also not a bar to plaintiff's recovery.[221] It was unclear, however, what effect the plaintiff's contributory negligence had on his recovery in an action based on strict liability in tort. Although the Mississippi Supreme Court has had several opportunities to answer this question, it has never specifically done so.

However, in 1975, the United States Fifth Circuit Court of Appeals, interpreting Mississippi law, answered this question in *Edwards v. Sears, Roebuck & Co.*[222] In *Edwards*, the court stated that since Mississippi has adopted a pure form of comparative fault,[223] contributory negligence may be used to reduce a plaintiff's recovery in an action based on strict liability in tort.[224] In 1979, the Mississippi Supreme Court, without addressing the question, cited *Edwards* with approval in *Toyota Motor Company, Ltd. v. Sanford*.[225] And in 1990, the Mississippi Supreme Court in *Purina Mills, Inc. v. Moak*,[226] held that it was proper for the trial judge to instruct the jury on the law of contributory negligence in order to reduce the plaintiff's recovery. However, even though the jury considered the defendant's evidence of the plaintiff's contributory negligence, the jury did not find that the plaintiff was contributorily negligent. Hence, the Mississippi Supreme Court did not have occasion to rule whether contributory negligence will actually reduce a plaintiff's recovery in an action based on strict liability in tort.

---

[219] *See* MISS. CODE ANN. § 11-7-15 (1972). That section states:

> In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.

Id.

[220] Ford v. Matthews, 291 So. 2d 169, 174 (Miss. 1974).

[221] *Ford*, 291 So. 2d at 175.

The Mississippi Supreme Court had another opportunity to address this question in 1993 but again refused to do so. In *Sperry-New Holland v. Prestage*,[227] the plaintiff brought a products liability action based on both strict liability in tort and negligent design. The jury found for the plaintiff under both theories and found the plaintiff 35% comparatively negligent. Although the jury damage award to the plaintiff was reduced by thirty-five percent, the Mississippi Supreme Court did not address whether comparative negligence is applicable to strict liability cases. The court stated in a footnote:

---

[222] 512 F.2d 276 (5th Cir. 1975).

[223] MISS. CODE ANN. § 11-7-15 (1972).

[224] *Edwards*, 512 F.2d at 290. In *Edwards*, the court stated:

> We believe the trial court took the correct path through the thicket of strict liability and contributory negligence. While the issue has not been considered by the Mississippi Supreme Court, a noted commentator has suggested that the proper interaction between strict liability and contributory negligence "should be apparent upon reflection. It is to apply a system of comparative fault of the 'pure type' and apply it to strict liability as well as to negligence."

Id. (citing John W. Wade, *Strict Liability*, 44 MISS. L.J. 825, 850 (1973)).

[225] 375 So. 2d 1036 (Miss. 1979). In *Sanford*, the court considered the jury's right to diminish the plaintiff's damages in an action based on strict liability in tort because of the plaintiff's contributory negligence. *Id.* at 1038. However, the court found it unnecessary to decide the question in the case. *Id.*

[226] 575 So. 2d 993 (Miss. 1990).

[227] 617 So. 2d 248 (Miss. 1993).

> It is important to note that the jury's damage award to [plaintiff] was reduced by 35 percent due to [plaintiff's] comparative negligence. This Court, however, has never definitively stated that comparative negligence is applicable to strict liability cases. *See Nichols v. Western Auto Supply Co., Inc.*, 477 So. 2d 261 (Miss. 1985); *Braswell v. Economy Supply Co.*, 281 So. 2d 669 (Miss. 1973). This is, indeed, an important question that courts from around the nation have grappled with. But because this issue was not raised on appeal and is not before us, this Court declines to address it and affirms the reduced amount of damages.[228]

Hence, it is apparent that the Mississippi Supreme Court will not answer the question of what effect the plaintiff's contributory negligence will have on his recovery in a products liability action based on strict liability in tort until the proper case is presented. The writer believes that the answer to the question should be that, in products liability actions based on strict liability in tort, the plaintiff's contributory negligence should simply reduce his recovery by his percentage of negligence. This view would be consistent with the Mississippi rule of pure comparative fault.

Another defense that could be used in products liability cases before the passage of the Mississippi Products Liability Act was assumption of risk. The Mississippi Supreme Court has stated that the assumption of risk defense is viable in Mississippi and may be applied in the proper case based on strict liability in tort.[229] Assumption of risk is a bar to an action by a plaintiff in Mississippi.[230] This defense is available even though Mississippi has a pure form of comparative fault. The form of assumption of risk that is applicable in Mississippi is subjective. In order for the assumption of risk defense to apply, the plaintiff must prove three things:

---

[228] *Prestage*, 617 So. 2d at 264 n.8.

[229] *See, e.g.,* Nichols v. Western Auto Supply Co., 477 So. 2d 261, 264 (Miss. 1985) (holding that since assumption of risk was still viable in Mississippi, it may be applied in strict liability case).

[230] Alley v. Preshak Mach. Co., 366 So. 2d 661 (Miss. 1979); Braswell v. Economy Supply Co., 281 So. 2d 669 (Miss. 1973).

> (1) [T]he injured party has knowledge of the condition inconsistent with her safety; (2) the injured party *appreciated* the danger in the condition; and (3) the injured party *deliberately* and *voluntarily* chose to expose herself to that danger in such a manner as to register assent on the continuance of the dangerous condition.[231]

The question of assumption of risk is a jury issue and should seldom be employed except when the plaintiff's conduct is venturous.[232] The doctrine of assumption of risk has been limited and restricted in Mississippi because of Mississippi's pure form of comparative fault.[233]

There are some instances where assumption of risk overlaps and coincides with contributory negligence. In those instances, the rules of the defense of contributory negligence apply.[234] Moreover, when assumption of risk and contributory negligence overlap, it is reversible error for the trial judge to give the assumption of risk instruction to the jury.[235]

---

[231] *See* Yarbrough v. Phipps, 285 So. 2d 788, 791 (Miss. 1973); *see also Alley*, 366 So. 2d at 664; Elias v. New Laurel Radio Station, Inc., 146 So. 2d 558, 561-62 (Miss. 1962).

[232] *Yarbrough*, 285 So. 2d at 790.

[233] *Braswell*, 281 So. 2d at 673.

[234] *Id.* at 678.

[235] *Id.* In *Braswell*, the plaintiff, a contractor who had been in the construction business for twenty-seven years, was a business invitee in the defendant's lumber shed. The plaintiff was injured when a stack of lumber fell upon him. The plaintiff alleged that the defendant was negligent in stacking the lumber and in failing to warn him of the danger. The defendant alleged that the plaintiff assumed the risk because he must have known that it was unsafe to enter the lumber bin adjacent to much higher stacks of lumber which could be tipped over easily by anyone standing next to them. After the trial judge gave an instruction on assumption of risk, the jury found for the defendant. The trial court rendered a judgment for the defendant. The Mississippi Supreme Court reversed and found that in this case, the doctrine of assumption of risk overlaps and coincides with contributory negligence because the issue was whether the plaintiff acted as a reasonably prudent person by entering the lumber bin, not whether he was encountering a known risk, or a risk that he should have discovered because of his experience in the construction industry. *Id.* at 677.

The court was careful to point out that the defense of assumption of risk is still viable in Mississippi and will bar recovery when a plaintiff's negligence is the sole proximate cause of his injury. Additionally, the court pointed out that contributory

Another defense that has been used in products liability actions in Mississippi is the plaintiff's misuse or abnormal handling of the product. It was generally held before the passage of the Mississippi Products Liability Act that a manufacturer is not liable for injuries resulting from a plaintiff's abnormal or unintended use of the product, if such use was not reasonably foreseeable by the manufacturer.[236] However, if the misuse is of the type that the manufacturer might reasonably be expected to foresee and guard against, then the manufacturer's liability is not affected.[237]

There was one additional defense that defendants in failure to warn cases could use in products liability actions prior to the passage of the Mississippi Products Liability Act; the defendant could assert that the plaintiff's injuries were caused by a dangerous defect which was open and obvious. In Mississippi, a manufacturer or seller has no duty to warn a purchaser of a dangerous defect which is open or obvious.[238] Absent a duty to warn, there can be no liability. In these instances, courts equate the term open or obvious with assumption of risk. Since assumption of risk is a bar to recovery, the plaintiff may not recover. The flaw in this reasoning is that with open or obvious defect cases, the plaintiff's injury may result from his failure to discover the patent defect. This failure to discover the defect is more akin to contributory negligence which only reduces the plaintiff's recovery by his percentage of negligence. This practice of refusing to extend protection to an injured plaintiff for injuries caused by an open or obvious defect is inconsistent with Mississippi's system of pure comparative fault.[239]

Defenses Available Under the MPLA

The Mississippi Products Liability Act essentially codifies

---

negligence is still a viable defense and will be applied when the negligence of both the plaintiff and defendant are contributing proximate causes of plaintiff's injury. *Id.*

[236] Ford Motor Co. v. Matthews, 291 So. 2d 169, 174 (Miss. 1974).

[237] Early-Gary, Inc. v. Walters, 294 So. 2d 181, 186 (Miss. 1974).

[238] Brown v. Williams, 504 So. 2d 1188, 1191 (Miss. 1987); Harrist v. Spencer-Harris Tool Co., 140 So. 2d 558, 561 (Miss. 1962).

[239] *See* Maraist & Barksdale, *supra* note 5, at 191.

the defenses which existed under prior Mississippi law. Subsection 1(d) of the Act provides that in any action brought under the Mississippi Products Liability Act, the manufacturer or seller will not be liable if the claimant assumed the risk. The section states:

> In any action alleging that a product is defective pursuant to paragraph (a) of this section, the manufacturer or seller shall not be liable if the claimant (i) had knowledge of a condition of the product that was inconsistent with his safety; (ii) appreciated the danger in the condition; and (iii) deliberately and voluntarily chose to expose himself to the danger in such a manner to register assent on the continuance of the dangerous condition.[240]

This form of assumption of risk is the subjective type that was applicable to products liability cases prior to the passage of the Mississippi Products Liability Act.[241] If the manufacturer or seller proves that the claimant assumed the risk, the claimant is barred from recovery.

The Act further provides an additional defense in actions based on inadequate warnings or instructions. Section (e) states:

> In any action alleging that a product is defective pursuant to paragraph (a)(i)2 of this section, the manufacturer or seller shall not be liable if the danger posed by the product is known or is open and obvious to the user or consumer of the product, or should have been known or open and obvious to the user or consumer of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons who ordinarily use or consume the product.[242]

This section provides that in failure to warn cases, the manufacturer or seller is not liable to the claimant if the claimant either knew or should have known of the product's danger which was open and obvious. Hence, if the manufacturer proves that the plaintiff in fact knew of an open and obvious danger or that a reasonable user or consumer with ordinary knowledge of the product would have known of such danger, the plaintiff is barred from recovery. This section merely codifies existing Mississippi law which states that when a danger is open and obvious to a reasonable user or consumer, neither the manufacturer nor seller has a duty to warn of the danger.[243]

---

[240] MISS. CODE ANN. § 11-1-63(d) (Supp. 1993).

[241] *See supra* notes 229-35 and accompanying text.

[242] MISS. CODE ANN. § 11-1-63(e) (Supp. 1993).

Thus it appears that assumption of risk remains a viable defense in all products liability cases brought in Mississippi courts after the passage of the Mississippi Products Liability Act. Furthermore, in products liability cases based on failure to warn, the fact that the danger was open and obvious remains a viable defense in Mississippi. A question that still remains unanswered is whether the defense of contributory negligence is applicable in products liability cases under Mississippi's pure comparative fault scheme.[244]

Litigants who advocate applying comparative fault principles in products liability cases brought under the Mississippi Products Liability Act will cite *Edwards*, *Sanford*, and *Moak*, as well as statements by Dean John W. Wade,[245] as authority. Dean Wade has been cited frequently by the Mississippi Supreme Court and is recognized as a pioneer in the products liability area. Dean Wade believed that comparative fault of the pure type should apply to strict liability as well as negligence because that is the only fair and consistent solution.[246] This is because the all-or-nothing system of contributory negligence is unfair to the plaintiff. Likewise, the system that states that contributory negligence does not apply to strict liability actions is unfair to the defendant because it allows the plaintiff to recover the full amount of his damages even though he has been negligent.[247] Additional support for the argument that comparative fault principles should apply to actions brought under the Mississippi Products Liability Act is found in Mississippi's Comparative Fault Statute[248] which states:

---

[243] *See* Harrist v. Spencer-Harris Tool Co., 140 So. 2d 558, 561 (Miss. 1962) ("No duty rests upon a manufacturer or seller to warn a purchaser of a dangerous design which is obvious. If this were true, a manufacturer could not design and sell a pocket knife, axe, planer or gun."); Brown v. Williams, 504 So. 2d 1188 (Miss. 1987).

[244] MISS. CODE ANN. § 11-7-15 (1972).

[245] *See* John W. Wade, *Multiple Tortfeasor Liability in Products Liability Suits*, 55 MISS. L.J. 683 (1985); *see also supra* note 28.

[246] *See supra* note 28 and accompanying text.

> In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.[249]

The statute appears to be very broad and arguably covers products liability actions since such actions are usually brought for personal injuries or property damages.

Litigants who advocate that contributory negligence should not be a defense in products liability actions under the Mississippi Products Liability Act will cite the fact that contributory negligence has not been specifically applied as a defense by the Mississippi Supreme Court in strict products liability cases as well as the footnote cited in *Prestage* where the court stated that it has never specifically addressed this issue.[250] Additionally, litigants will no doubt assert that since the Mississippi Products Liability Act does not list contributory negligence as a defense, it does not apply. Finally, litigants will likely assert that applying the defense of contributory negligence to products liability actions is like mixing "oil and water, or apples and bananas [which] cannot be mixed or compared."[251]

---

[247] Wade, *supra* note 245, at 698.

[248] MISS. CODE ANN. § 11-7-15 (1972).

[249] MISS. CODE ANN. § 11-7-15 (1972).

[250] *See supra* note 228 and accompanying text.

[251] Wade, *supra* note 245, at 698.

XI. HOW THE MISSISSIPPI PRODUCTS LIABILITY ACT OF 1993 CHANGES THE MISSISSIPPI WRONGFUL DEATH ACT

The Mississippi Products Liability Act of 1993 made several changes to the Mississippi Wrongful Death Act.[252] This section will detail how the Wrongful Death Act has been changed by the Mississippi Products Liability Act of 1993. These changes affect all wrongful death actions brought in Mississippi, not just wrongful death actions resulting from defective products.

A. Who May Recover in a Wrongful Death Action Under the Mississippi Wrongful Death Act?

The Wrongful Death Act, as amended, states that a wrongful death action may be brought in the name of the personal representative of the deceased person for the benefit of all persons entitled under the law to recover: by a husband for the death of his wife; by a wife for the death of her husband; by a parent for the death of a child, or in the name of a child; in the name of a child for the death of a parent; by a brother for the death of a sister; by a sister for the death of a brother; by a sister for the death of a sister; or by a brother for the death of a brother. The Wrongful Death Act further provides that there shall be but one suit for the same death which shall ensue for the benefit of all parties concerned, and that all interested parties may join in that suit. Moreover, the determination of such suit shall not bar another action until it is decided on the merits. The foregoing is not new for it was included in the earlier version of the Wrongful Death Act.

Under the previous version of the Wrongful Death Act, the legal representative who brought the wrongful death action had to bring the action in two counts.[253] One count sought damages for the beneficiaries listed in the Wrongful Death Act, while the other count sought damages for the personal representative as assets of the estate such as damage to real or personal property, funeral expenses and medical expenses.[254] The verdict of the jury had to be responsive to each of the counts.[255] The purpose of such a requirement was to separate damages that are assets of the estate from the damages that belong to the beneficiaries listed in the statute. The separation of damages was necessary because assets of the estate are subject to debts and liabilities of the deceased while the amounts awarded to persons listed in the statute are taken free from the debts and liabilities of the deceased.[256] The Wrongful Death Act, as amended, should make no change to this provision of the law; that is, wrongful death actions brought under the amended statute should also be brought in two counts.

---

[252] MISS. CODE ANN. § 11-7-13 (1972) (hereinafter Wrongful Death Act).

[253] Thornton v. Insurance Co. of North Am., 287 So. 2d 262, 267 (Miss. 1973).

The Mississippi Supreme Court has recognized that only those persons specifically named in the wrongful death statute may recover damages for wrongful death.[257] If there are no surviving heirs specifically named in the statute, the personal representative may recover on behalf of the decedent's estate.[258] In this instance, all damages recovered will be treated as any other asset of the estate, and will be subject to the payments of the debts of the estate.[259] Any residue will be distributed according to the last will and testament of the deceased, or under the statute of descent and distribution if there is no will.[260] The Wrongful Death Act, as amended, is in complete agreement with existing case law in this regard.

The Wrongful Death Act also provides that all references to "children" include descendants of a deceased child, who will take the share of the deceased child by representation. This provision is not new. The Mississippi Products Liability Act provides further that there will be no distinction between "kindred of the whole and half blood of equal degree." This provision is new; no such provision was included in the earlier version of the Wrongful Death Act. Consequently, under the Wrongful Death Act, there will be no distinction between claimants who are kindreds of the whole blood and claimants who are kindred of the half-blood, as there is under the Mississippi Law of Intestate Succession.[261]

---

[254] *Thornton*, 287 So. 2d at 267.

[255] *Id.*

[256] *Id.*

[257] Smith v. Garrett, 287 So. 2d 258, 261 (Miss. 1973).

[258] *Smith*, 287 So. 2d at 261; MISS. CODE ANN. § 11-7-13 (Supp. 1990); MISS. CODE ANN. § 11-7-13 (Supp. 1993).

[259] *Smith*, 287 So. 2d at 261.

[260] *Id.*

The Wrongful Death Act, as amended, makes two changes to the law as it relates to one's ability to recover by or on behalf of an illegitimate. The first change relates to the ability of illegitimate children to recover in a wrongful death action as a result of the death of their natural father, and as it relates to the ability of a natural father to recover in a wrongful death action as a result of the death of an illegitimate child. The first change resulted from the following statement which was added to the Wrongful Death Act:

> The provisions of this section shall apply to illegitimate children on account of the death of the natural father and to the natural father on account of the death of the illegitimate child or children, and they shall have all the benefits, rights and remedies conferred by this section on legitimates, if the survivor has or establishes the right to inherit from the deceased under Section 91-1-15.[262]

No such provision was contained in the previous version of the Wrongful Death Act. The previous version of the Wrongful Death Act made a reference only to the abilities of the natural mother and the illegitimate children of the natural mother to recover on account of each other's death in a wrongful death action.[263] The previous version was interpreted by the Mississippi Supreme Court in *Sanders v. Tillman*[264] to mean that an illegitimate son was not entitled to bring a wrongful death action for the death of his father because the father had not recognized the child during his lifetime. The court reasoned that "[i]t is a simple matter to prove the maternity of an illegitimate child, but it is infinitely more complex and difficult to prove paternity." [265]

---

[261] For example, sections 91-1-3 and 91-1-5 of the Mississippi Code, which govern Mississippi's law of intestate succession have been construed to mean that brothers and sisters of the whole blood of a decedent [who are descendants of the second class] are entitled to the decedent's estate to the exclusion of the brothers and sisters of the half blood when there are no descendants of the first class who survived the decedent. *See* Jones v. Stubbs, 434 So. 2d 1362, 1364 (Miss. 1983).

[262] MISS. CODE ANN. § 11-7-13 (Supp. 1993).

[263] Both the previous and amended versions of the Wrongful Death Act contain the following statement: "The provisions of the section shall apply to illegitimate children on account of the death of the mother and to the mother on account of the death of an illegitimate child or children, and they have all the benefits, rights and remedies

However, there is a distinction between the ability of a natural mother and her illegitimate children to recover on the other's behalf and the ability of a natural father and his illegitimate children to recover on the other's behalf. The distinction is that the natural father and his illegitimate child or children have the ability to recover in a wrongful death action on account of the death of the other if the survivor has or establishes the right to inherit from the deceased under section 91-1-15 of the Mississippi Code.[266] This requirement does not apply to the natural mother and her illegitimate children and their ability to recover on the other's behalf.[267] Hence, although the amended version of the Wrongful Death Act differs from previous law, it still imposes an additional requirement regarding recovery among natural fathers and

---

conferred by this section on legitimates." MISS. CODE ANN. § 11-7-13 (Supp. 1993).

[264] 245 So. 2d 198 (Miss. 1971).

[265] *Sanders*, 245 So. 2d at 200.

[266] MISS. CODE ANN. § 91-1-5 (Supp. 1993). An illegitimate may inherit from the natural father and his kindred and the natural father and his kindred may inherit from the illegitimate if:

> (a) The natural parents participated in a marriage ceremony before the birth of the child; or
>
> (b) There has been an adjudication of paternity or legitimacy before the death of the intestate; or
>
> (c) There has been an adjudication of paternity after the death of the intestate, based upon clear and convincing evidence, in an heirship proceeding. However, no such claim of inheritance shall be recognized unless the action seeking an adjudication of paternity is filed within one (1) year after the death of the intestate or within ninety (90) days after the first publication of notice to creditors, whichever is less.

Id.

[267] *See supra* notes 261-63 and accompanying text.

illegitimate children which is not imposed regarding recovery among natural mothers and illegitimate children.

The second change relates to one's ability to recover on behalf of a deceased who is illegitimate. This change was brought about by the deletion of the following sentence from the previous version of the Wrongful Death Act:

> If the deceased be illegitimate and shall leave neither mother, child nor lawful heirs, then all the provisions of this section shall extend and apply to the legal representatives, and the other natural blood relatives of the deceased the same as if they were his legitimate relatives and heirs, excepting his father and his father's relatives, unless they be full brothers or sisters of deceased, or their heirs.

These two changes indicate that illegitimacy in relation to the father, for the most part, is no longer relevant in determining who may recover in a wrongful death action.

The hierarchy regarding the distribution of the damages recoverable under the Wrongful Death is the same under the previous version and the amended version.[268]

B. What Damages Are Recoverable Under the Wrongful Death Act?

The Wrongful Death Act, as amended, provides that in a wrongful death action, "the party or parties suing shall recover such damages *allowable by law* as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit."[269] The previous version of the Wrongful Death Act contained the same provision, minus the phrase "allowable by law." The language of the previous version of the wrongful death statute has been interpreted to mean that beneficiaries in a wrongful death action "may recover (1) the present net cash value of the life expectancy of the deceased, (2) the loss of companionship and society of the decedent, (3) the pain and suffering experienced by the decedent between the time of the injury and death, and (4) punitive damages."[270] Additionally, the language has been interpreted to mean that the personal representative may recover as assets of the estate (1) damage to real or personal property, (2) funeral expenses and (3) medical expenses.[271] This interpretation should also apply to the amended version of the Wrongful Death Act.

---

[268] The hierarchy is as follows: The damages will be equally distributed to the decedent's spouse and children. If the deceased has no spouse, the damages will be equally distributed to the children. If the deceased has no spouse or children, the damages will be equally distributed to the father, mother, brothers, and sisters living at the time of the decedent's death. If the deceased has no spouse, children, parents or siblings, then the damages will go to the legal representative of the estate. MISS. CODE ANN. § 11-7-13 (Supp. 1993).

[269] MISS. CODE ANN. § 11-7-13 (Supp. 1993) (emphasis added).

The amended version of the Wrongful Death Act specifically provides for types of damages which are not mentioned in the original version. The amended version provides:

> In an action brought pursuant to the provisions of this section by the widow, husband, child, father, mother, sister or brother of the deceased, or by all interested parties, such party or parties may recover as damages property damages and funeral, medical or other related expenses incurred by or for the deceased as a result to such wrongful or negligent act or omission or breach of warranty, whether an estate has been opened or not.[272]

This provision is new. Under the previous version of the Wrongful Death Act, there is no reference to these specific damages. That version provided only for such damages as the jury determines to be just.[273] However, this language has been interpreted to mean that the personal representative of the decedent may recover these damages.[274] Moreover, the previous version does not address the issue of whether the decedent's estate has been opened, and what effect that may have.

---

[270] *See* McGowan v. Estate of Wright, 524 So. 2d 308, 311 (Miss. 1988) (construing Wrongful Death Act); *see also* Jones v. Shaffer, 573 So. 2d 740, 743 n.2 (Miss. 1990) (discussing elements of recoverable damages under amended Wrongful Death Act).

[271] Thornton v. Insurance Co. of North Am., 287 So. 2d 262, 267 (Miss. 1973).

[272] MISS. CODE ANN. § 11-7-13 (Supp. 1993).

[273] MISS. CODE ANN. § 11-7-13 (1972) (original version).

[274] *See supra* notes 252-55 and accompanying text.

The Wrongful Death Act, as amended, also adds a new provision which specifies the only types of damages recovered that are subject to payment of the debts and liabilities of the decedent. That provision states:

> Any amount, but only such an amount, as may be recovered for property damage, funeral, medical or other related expenses shall be subject only to the payment of the debts or liabilities of the deceased for property damages, funeral, medical or other related expenses. All other damages recovered under the provisions of this section shall not be subject to the payment of the debts or liabilities of the deceased, except as hereinafter provided, and such damages shall be distributed as follows: . . . .[275]

This provision is simply a codification of existing Mississippi case law which stated that these damages are assets of the estate and are subject to the debts and liabilities of the decedent.[276]

The remaining provisions of the Wrongful Death Act, as amended, regarding distribution remain the same as in the previous version. In the previous version, the only time that the damages recovered were subject to the payments of the debts and liabilities of the decedent was when the deceased had neither husband, nor wife, nor children, nor father, nor mother, nor sister, nor brother. In this instance, the damages went to the legal representative, subject to debts and general distribution under the statute.

There is no indication in the amended version of the Wrongful Death Act as to what effect the new phrase "allowable by law" should have on the law. One interpretation of this phrase is that in addition to allowing the claimants in a wrongful death action to recover the damages enumerated above,[277] it allows claimants in a wrongful death action to recover for hedonic damages, which are damages awarded for the loss of the value of living or loss of the enjoyment of life.[278]

---

[275] MISS. CODE ANN. § 11-7-13 (Supp. 1994).

[276] *See supra* note 253 and accompanying text.

[277] *See supra* note 268 and accompanying text.

[278] Brady, *supra* note 151, at 502.

To date, Mississippi law has not recognized hedonic damages in a wrongful death action. However, there have been a few references in recent decisions of the Mississippi Supreme Court to indicate that hedonic damages may be awarded in Mississippi wrongful death actions. For example, in *Jones v. Shaffer*,[279] three justices of the Mississippi Supreme Court in a concurring opinion made a strong argument that section 11-7-13 of the Mississippi Code allows the court to award hedonic damages to the estate of a decedent who was killed in an automobile accident. The concurring opinion stated in part:

> It cannot be overemphasized that we are construing a statute. Section 11-7-13 mandates that the jury award such damages as are "just" and including all damages of every kind to the decedent. . . . [Our previous reading of the statute] implicitly assumes that the average person derives no value from living. . . . "This cannot be right, and it results in a systematic underestimation of damages in wrongful death cases." . . . Our old approach to Section 11-7-13 arose in another world and is inadequate twofold: first, it assumes quite wrongly that the person who has been killed would obtain no (non-pecuniary) utility from continuing to live beyond his income production. Little reflective thought is required to recognize that this is simply not so. . . . Second, the thoughtful literature of late convincingly demonstrates that the attack on non-pecuniary damages, e.g., pain and suffering, is misdirected. . . . The aggregate social costs of accidents will be held to their optimal level when the injurers are made to pay to victims full actual losses. Actual losses include both pecuniary and non-pecuniary losses. All of this fits nicely within Section 11-7-13's "all damages of every kind."[280]

The statements in *Shaffer* advocating an award of hedonic damages recognize that the Wrongful Death Act is broad and gives the jury wide discretion in awarding damages. Other decisions of the Mississippi Supreme Court where there are indications that some justices favor the award of hedonic damages are *McGowan v. Estate of Wright*[281] and *Koestler v. Federal Insurance Company*.[282]

---

[279] 573 So. 2d 740 (Miss. 1990).

[280] *Jones*, 573 So. 2d at 744-45 (Robertson, J., concurring) (citations omitted).

Unlike some wrongful death statutes which list the damages that may be recovered in a wrongful death action,[283] the Mississippi Wrongful Death Act does not contain such a list. Instead, it provides for damages in comprehensive terms[284] and can easily be construed to include hedonic damages.[285]

Additionally, another decision of the Mississippi Supreme Court has advocated awarding hedonic damages in personal injury cases. In *W. J. Runyon & Son, Inc. v. Davis*,[286] eight justices of the Mississippi Supreme Court considered a partial loss of the enjoyment of life as a factor in awarding damages to a claimant who sustained a permanent neck injury.[287]

---

[281] 524 So. 2d 308 (Miss. 1988). In *McGowan*, three justices in a dissenting opinion advocated an award of hedonic damages. *Id.* at 311-13.

[282] 608 So. 2d 1258 (Miss. 1992). In *Koestler*, a dissenting justice indicated that "provable wrongful death damages might also have included loss of society and companionship and, as well, *loss of the value of continuing to live*." *Id.* at 1270 (emphasis supplied).

[283] For example, Nevada's Wrongful Death Act states in part that "the court or jury may award each [heir] pecuniary damages for his grief or sorrow, loss of probable support, companionship, society, comfort and consortium, and damages for pain, suffering or disfigurement of the decedent." NEV. REV. STAT. ANN. § 41.085(4) (Michie 1986).

[284] MISS. CODE ANN. § 11-7-13 (Supp. 1993). "In such action the party or parties suing shall recover such damages *allowable by law* as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit." *Id.* (emphasis added).

[285] *See, e.g.*, Pitman v. Thorndike, 762 F. Supp. 870, 871 (D. Nevada 1991) (citing MISS. CODE ANN. § 11-7-13 (1972) as providing for damages "in expansive terms," as compared with Nevada's statute).

[286] 605 So. 2d 38 (Miss. 1992), *overruled on other grounds* by Richardson v. APAC-Mississippi, Inc., No. 90-CA-1301, 1994 WL 7636 (Miss. 1994) (rejecting employer control analysis in *Runyon* when facts disputed).

[287] The court stated:

> The evidence reflected Davis had incurred $64,401.06 in past medical expenses and more than $4,000 in projected future medical expenses. He had lost his job and lost past wages of $21,158.67. Dr. James Langston Hughes, orthopedic surgeon, testified Davis suffered a twelve percent permanent partial impairment to the body as a whole because of his permanent neck injury. Without doubt, Davis suffered a substantial temporary total disability. Moreover, Davis suffered great pain and suffering and discomfort and

In interpreting the phrase "allowable by law," one could argue that the expansive nature of the Mississippi Wrongful Death Act, coupled with the fact that it does not contain a list of allowable damages, as do some statutes, and the fact that hedonic damages are in no way prohibited by Mississippi law, evidence the fact that hedonic damages are damages that may be awarded in a wrongful death action in Mississippi. These factors, along with the desires of some justices of the Mississippi Supreme Court to award hedonic damages in both wrongful death and personal injury actions, add strong support for an award for hedonic damages in wrongful death actions in Mississippi.

On the other hand, one could argue that the phrase "allowable by law" actually limits the damages that may be awarded in a wrongful death action. Since Mississippi law has limited recovery in wrongful death cases to four general areas[288] and since hedonic damages have never been awarded as a separate item of damages in a wrongful death action in Mississippi, one could argue that hedonic damages are not allowable by Mississippi law. As a result, hedonic damages may not be recovered in a wrongful death action in Mississippi. Strong support for this argument is found in *Moore v. The Kroger Co.*,[289] where the court, in a personal injury action, considered the concurring opinion in *Shafer*[290] and rejected it. In addition to recognizing that Mississippi law has limited recovery in a wrongful death action to four general areas, none of which refer to the loss of enjoyment of life, the court stated that there is the possibility of double recovery if hedonic damages are awarded in a personal injury action.[291] This is

---

> downright indignity in the days and months following his accident. *He has suffered as well a partial loss of the enjoyment of life*. . . . He has a permanent wire in his mouth.

Runyon, 605 So. 2d at 50 (citations omitted) (emphasis added).

[288] *See supra* note 268 and accompanying text.

[289] 800 F. Supp. 429 (N.D. Miss. 1992).

[290] *Moore*, 800 F. Supp. at 435. The court noted that "despite a concurring opinion by Justice Robertson [Mississippi has not recognized hedonic damages.]" *Id.*

[291] *Id.* The court cautioned against allowing recovery for both hedonic damages and damages for future pain and suffering. *Id.*

because in a personal injury action a claimant may recover for past, present and future physical pain and suffering as well as for mental anguish and physical disability.[292] These damages, according to the court, are very similar to, if not synonymous with damages for the loss of enjoyment of life. To award damages for the loss of enjoyment of life would only encourage duplicate awards and juror confusion.[293]

The court also added that nothing prohibits hedonic damages from being considered as a factor in determining damages in general or those for pain and suffering.[294]

The meaning of the phrase "allowable by law" will no doubt have to be decided by the Mississippi Supreme Court since there is nothing in the Mississippi Products Liability Act or in the Mississippi Wrongful Death Act to provide direction as to what is meant by the phrase. Moreover, since the propriety of an award for hedonic damages in wrongful death and personal injury actions is a controversial issue that has recently been discussed by the courts in Mississippi, we must await guidance from the Mississippi Supreme Court to determine if such an award is appropriate.

C. What Theories of Liability are Available Under the Wrongful Death Act?

The previous version of the Wrongful Death Act provided three possible bases of liability in cases where the injured person, if death had not ensued, could have maintained the action. The Wrongful Death action could have been brought when death was caused by "[1] any real, wrongful or negligent act or omission, or [2] by such unsafe machinery, way or appliances. . . or . . . [3] by the breach of any warranty, express or implied, of the purity or fitness of any foods, drugs, medicines, beverages, tobacco or any and all other articles or commodities intended for human consumption."[295] The wrongful death action for breach of a warranty was expressly limited by the Wrongful Death Act to goods related to human consumption.[296] Moreover, the Mississippi Supreme Court has not specifically addressed the issue of whether wrongful death actions could be based on a breach of a warranty for goods that were not intended for human consumption.

---

[292] *Id.*

[293] *Id.*

[294] *Id.* at 436.

The amended version of the Wrongful Death Act increases the number of theories of liability available in a wrongful death action. It provides that a wrongful death action may be brought when death is caused by breach of any express warranty, implied warranty, negligence, or by unsafe machinery or appliance. The Wrongful Death Act also states that the wrongful death action may be based on strict liability in tort or any cause of action known to the law for which any person, corporation, legal representative or entity would be liable for damages if death had not ensued.[297] This language significantly expands the theories available in a wrongful death action because it allows the action to be based on the breach of any warranty, express or implied, not just the breach of a warranty related to articles or commodities intended for human consumption, as did the previous language of the Mississippi Wrongful Death Act.[298] The most significant change brought about by the

---

[295] MISS. CODE ANN. § 11-7-13 (1972); Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 290 (5th Cir. 1975).

[296] However, the United States Court of Appeals for the Fifth Circuit, while applying Mississippi law in Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1975) and McCullough v. Beech Aircraft Corp., 587 F.2d 754 (5th Cir. 1979), seemed to indicate that a wrongful death action based on breach of an express warranty may only be brought when the warranty relates to goods or articles intended for human consumption.

[297] MISS. CODE ANN. § 11-7-13 (Supp. 1993).

[298] The language of the previous version of the Wrongful Death Act stated in part:

> Whenever the death of any person shall be caused by the breach of any warranty, express or implied, of the purity or fitness of any foods, drugs, medicines, beverages, tobacco or any and all other articles or commodities intended for human consumption, as would, had the death not ensued, have entitled the person injured or made ill or damaged thereby, to maintain an action and recover damages in respect thereof. . . [the tortfeasor shall be liable for damages to the decedent's wrongful death beneficiaries, notwithstanding

amended Wrongful Death Act is that a wrongful death action in Mississippi may now be based on "any cause of action known to the law." This statement is broad and as a result, all theories of liability known to Mississippi law should now be available in a wrongful death action.

XII. DOES THE MISSISSIPPI PRODUCTS LIABILITY ACT OVERRULE THE *SHAINBERG* DOCTRINE?

In 1972 in *Sam Shainberg Co. of Jackson v. Barlow*,[299] the Mississippi Supreme Court held that neither a wholesaler nor a retailer may be held strictly liable for marketing a defective and unreasonably dangerous product which causes injury to a plaintiff if it is a mere conduit of the product that it has purchased from a reputable manufacturer.[300] In *Shainberg*, the plaintiff brought an action for personal injuries based on the theory of strict liability in tort against the wholesaler and retailer of a pair of new shoes that she bought.[301] The plaintiff sustained injuries when she fell while descending a step while wearing the shoes. The plaintiff alleged that the fall resulted because the heel of one of the shoes was not properly affixed to the shoe.[302] The plaintiff further alleged that the shoes were defectively manufactured, were not reasonably safe for ordinary use and were in a defective condition which rendered them unreasonably dangerous to the user.[303] In holding that the wholesaler and retailer of the shoes were not liable to the plaintiff, the court stated:

> We are unwilling to extend the rule of strict products liability in tort to the wholesaler and retailer under the undisputed facts of this case. . . . Where the wholesaler or distributor purchases an article from a reputable and reliable manufac-

---

the death.]

[299] 258 So. 2d 242 (Miss. 1972).

[300] *Shainberg*, 258 So. 2d at 246.

[301] *Id.* at 243. The plaintiff also sued the manufacturer. However, the claim against the manufacturer was later dismissed because the plaintiff could not obtain service of process. *Id.*

[302] *Id.*

[303] *Id.*

> turer, sells it to a retailer in its original condition, and the retailer in turn sells the article—exactly as it came from the manufacturer—to a customer in the regular course of business, no duty devolves on the wholesaler or retailer to inspect and discover a latent defect. . . .
>
> [I]t would not be reasonable, logical or practical to place on every retail merchant the absolute duty of inspecting for latent defects every [product] . . . that the retailer might offer for sale. Such a rule of law would make each retail merchant an insurer or guarantor of every one of the thousands of items that he might handle merely as a sales conduit.[304]

This view has become known as the *Shainberg* doctrine.

The *Shainberg* doctrine, which has been followed in Mississippi since 1974,[305] represents a minority view and is inconsistent with the letter and the spirit of strict liability in tort.[306] Hence, because of this inconsistency, the doctrine was destined not to stand the test of time.

In 1986, in *Coca Cola Bottling Co. v. Reeves*,[307] the Mississippi Supreme Court severely criticized the *Shainberg* doctrine. Although the court did not overrule *Shainberg*, it was questionable whether the doctrine was still applicable in Mississippi products liability cases. In *Reeves*, a two year old bystander sustained serious permanent injury to his left eye when a soft drink bottle fell through the bottom of a cardboard carton, struck the floor, and shattered into several pieces. The plaintiff brought a products liability action against the distributor who had distributed the soft drinks in the cardboard cartons. The plaintiff alleged that the cardboard carton was defective and that the distributor was liable on theories of strict liability in tort, implied warranty and negligence. The defendant relied on *Shainberg* in alleging that it was not liable for the plaintiff's injuries. The court, without overruling *Shainberg*, questioned whether *Shainberg* was a rational decision. The court reiterated that the doctrine of strict liability in tort was to apply not only to a product manufacturer but also to any wholesale or retail dealer or distributor.[308] Accordingly, the court stated that "[i]n this context, our *Shainberg* holding that the duty is not imposed upon a retailer is anomalous if not irrational."[309]

---

[304] *Id.* at 244, 246.

[305] The Mississippi Supreme Court followed the *Shainberg* doctrine in Parker v. Ford Motor Co., 331 So. 2d 923 (Miss. 1976), holding that a retailer was not liable for injuries sustained by the plaintiff. Additionally, the court apparently relied on the *Shainberg* doctrine in Early-Gary, Inc. v. Walters, 294 So. 2d 181 (Miss. 1974), holding that a restaurant operator was not liable to a customer for injuries sustained when he was attempting to open a bottle of ketchup. However, in *Walters*, the court did not mention the *Shainberg* decision.

[306] WILLIAM KIMBLE & ROBERT O. LESTER, PRODUCTS LIABILITY 56 (1979).

[307] 486 So. 2d 374 (Miss. 1986).

Moreover, in an effort to debilitate the effect of *Shainberg*, the court cited articles from several commentators who had criticized the *Shainberg* doctrine as being misplaced and inconsistent with products liability law.[310] At this point, it would have been appropriate for the court to overrule *Shainberg*. However, instead of overruling *Shainberg*, the court created confusion by distinguishing *Shainberg* and holding that the distributor was liable to the plaintiff for other reasons.[311]

In *Curry v. Sile Distributors*,[312] a federal court judge interpreting Mississippi law held that a distributor who is acting as a mere distributor *may* be strictly liable for injuries suffered by a plaintiff as a result of a defective product. The judge stated:

> However, *Shainberg*, though not explicitly overturned, is no longer the law of Mississippi . . . . While *Shainberg* has not been expressly overturned, the prerequisites for recovery set forth in [*Reeves*], as a matter of logical necessity, strip *Shainberg* of any precedential value. Consequently, the court

---

[308] *Reeves*, 486 So. 2d at 378.

[309] *Id.*

[310] *Id.*

[311] *Id.* at 379. The court found that since the distributor, Vicksburg Coke, manufactured the soft drinks, placed them in Coke bottles and in turn placed them in the cardboard carton in issue, and since it sold, distributed, and physically delivered to the retailer the carton in issue that was colored red and bore only the Coca Cola insignia, that Vicksburg Coke should have known that third parties would rely on Vicksburg Coke to the exclusion of all others to guarantee the safety of the bottle, the soft drink and the carton. Hence, the facts of this case are unlike *Shainberg*, where the reasonable consumer would rely on the manufacturer of the product to the exclusion of the retail seller, Sam Shainberg Company of Jackson. *Id.*

[312] 727 F. Supp 1052 (N.D. Miss. 1990).

> refuses to apply *Shainberg*, and [the retailer] must seek its relief in Mississippi's indemnity law.[313]

Hence, after *Reeves* and *Curry*, it became questionable whether the *Shainberg* case was still good law in Mississippi. The stage was set for *Shainberg* to be overruled either by the Mississippi Supreme Court or the Mississippi Legislature.

The Mississippi Products Liability Act of 1993 effectively overrules the *Shainberg* decision. Section (g) of the Act provides:

> (g)(i) the manufacturer of a product who is found liable for a defective product pursuant to Section 1(a) shall indemnify a product seller for the cost of litigation, any reasonable expenses, reasonable attorneys fees and any damages awarded by the trier of fact unless the seller exercised substantial control over that aspect of the design, testing, manufacture, packing or labeling of the product that caused the harm for which recovery of damages is sought; the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; the seller had actual knowledge of the defective condition of the product at the time he supplied same; or the seller made an express factual representation about the aspect of the product which caused the harm for which recovery of damages is sought.
> (ii) Subparagraph (i) shall not apply unless the seller has given prompt notice of the suit to the manufacturer within thirty (30) days of the filing of the complaint against the seller.[314]

By allowing the seller of a product to seek indemnification from the manufacturer, the Mississippi Products Liability Act clearly acknowledges the wholesaler's, distributor's or retailer's potential liability to an injured party. Moreover, section 1 of the Act provides that an injured party may recover from the manufacturer or the seller of a product.[315]

Hence, it is clear that a plaintiff in a products liability action in Mississippi may not only seek recovery against the manufacturer of the product but against anyone in the distribution chain, including the wholesaler, distributor or retailer of the product. This is true even if the wholesaler, distributor or retailer of the product is a mere conduit in the distribution chain. If the injured party recovers against such wholesaler, distributor or retailer, that party's remedy is to seek indemnification from the manufacturer for the costs of litigation including any reasonable expenses, reasonable attorney's fees and any damages awarded by the trier of fact. In order to seek indemnity against the manufacturer, such wholesaler, distributor or retailer must notify the manufacturer within thirty days of the filing of the complaint against it. Thus, subsection (g) of the Mississippi Products Liability Act brings Mississippi in compliance with the view adopted by the majority of states. This view is consistent with the spirit of strict liability in tort.

---

[313] *Curry*, 727 F. Supp. at 1054.

[314] MISS. CODE ANN. § 11-1-63(g) (Supp. 1994).

[315] MISS. CODE ANN. § 11-1-63(g)(i)-(ii) (Supp. 1993).

With this change to the law of products liability in Mississippi, plaintiffs will have a greater number of defendants against whom to file suit. This should enable plaintiffs to recover from certain classes of merchants from whom they were unable to recover before the change in the law. Thus, although many changes brought about by the reform legislation are said to benefit defendants in products liability actions, this is one change that definitely benefits plaintiffs.

XIII. What Effect Will the Mississippi Products Liability Act Have on Business in Mississippi?

Supporters of the Mississippi Products Liability Act argued that legislation was needed to relieve businesses of the fear of excessive judgments and to spur economic development.[316] This fear of excessive judgments, it is believed, has caused some manufacturers to leave Mississippi, and has caused others not to relocate in Mississippi. Supporters of the legislation contended that the common law had evolved to a point that it was out of control.[317] More specifically, they alleged that the justices of the Mississippi Supreme Court and lower court judges were "becoming more liberal in their decisions and that they were writing laws and handing down opinions that were unfavorable to the business community."[318] The products liability legislation is designed to capture the law of products liability as it exists at the time of the legislation and to prevent further evolution of the law in Mississippi.[319] This codification of the law, it is alleged, will bring stability and predictability to the law of products liability, which in turn will allow product manufacturers to know what the rules are so that they can fashion their businesses accordingly.[320]

---

[316] Paul Barton, *Mills Defends Law Defining Product Safety*, COMMERCIAL APPEAL (MEMPHIS), Feb. 24, 1993, at A-12 (interview with Representative Mike Mills).

[317] *Id.*

On the other hand, critics of the legislation see it as anti-consumer which will result in consumers who are injured by products not being able to recover for their injuries.[321] Critics also see the legislation as an attempt by the insurance and manufacturing industries to enact unnecessary tort reform legislation.[322]

Perhaps the greatest impact that the legislation will have is that it will bring added predictability to Mississippi's law of products liability. The legislation holds the manufacturer of a product to the level of technology existing when the product was made. Arguably, since manufacturers will be judged by the state of the art as it existed at the time of manufacture, they will have a basis from which to predict what is required for each product.[323] With this predictability, manufacturers will be able to measure their products against the knowledge presently available to the academic and technological communities. This technology can serve as the basis for an industry's evaluation of the future impact of a new product.[324] With this standard available, manufacturers can more accurately evaluate their potential liability and take action by either adopting alternative designs or by providing more adequate warnings.[325]

---

[318] *Id.*

[319] *Id.*

[320] *Id.*

[321] *Smokers Beware, Warns Products Reform Law*, COMMERCIAL APPEAL (Memphis), June 7, 1993, at A5 (statement by Mississippi House of Representative member Tomie Green).

[322] *See* Liston, *supra* note 73, at 1-7.

[323] James M. Garner, *The Louisiana 1988 Products Liability Reform Act: The Changes and Their Effects*, 5 TUL. CIV. L. FORUM 129, 162 (1990) (discussion of effect of products liability act on state's law).

In addition to adding predictability to the law, the products liability legislation captures the law as it is and prevents further evolution of the law of products liability in Mississippi. In codifying the law of products liability, the legislation left many important questions unanswered. Any further evolution of the law will result only from the Mississippi Supreme Court's answers to these questions.

Whether the legislation will entice manufacturers to remain in Mississippi or otherwise to not leave the state remains to be seen. Products made in any given state routinely cross state lines and even enter the national stream of commerce. This may subject manufacturers to the laws of a number of states. Moreover, because of the mobility of products, manufacturers are not likely to know which state law will govern when a risk ultimately materializes.[326] Consequently, simply because Mississippi now has a products liability statute will not alone cause manufacturers of products to see Mississippi as the proper place to do business. This may be true especially because claimants may still recover punitive damages against manufacturers in products liability actions in Mississippi while they are unable to do so in products liability actions in some other states.[327]

Although the Mississippi Products Liability Act is viewed as primarily benefitting businesses, it should be noted that consumers also benefitted from the legislation. Because claimants are now able to seek recovery against wholesalers, retailers and anyone else in the distribution chain, claimants are now better able to select the party against whom recovery is sought. Under prior law, claimants in products liability actions in Mississippi were limited in their abilities to recover against particular defendants in that claimants could generally seek recovery against manufacturers of products and not against retailers and wholesalers.[328] As a result of the products liability legislation, claimants will now have better opportunities to recover against merchants and other sellers of products in Mississippi.

---

[324] *Id.* at 164.

[325] *Id.*

[326] *Id.* at 167.

[327] For example, claimants in products liability actions in Louisiana may not recover punitive damages. *See* Pittman v. Kaiser Aluminum & Chem. Corp., 559 So. 2d 879 (La. Ct. App. 1990); Commercial Union Ins. Co. v. Upjohn Co., 409 F.Supp. 453 (W.D. La. 1976).

CONCLUSION

The Mississippi Products Liability Act generally codifies existing Mississippi law of products liability. This codification of the law will provide predictability to the Mississippi law of products liability. Whether this predictability will encourage manufacturers to remain in or otherwise relocate in Mississippi, or whether it will result in injured consumers not being compensated remains to be seen. While some of the changes to existing law made by the legislation will make it more difficult for some plaintiffs to recover in products liability actions in Mississippi, other changes will make it easier for plaintiffs to recover against particular defendants.

In codifying existing law, the Mississippi Products Liability Act left many significant questions unanswered. Additionally, the legislation made several changes to Mississippi's law of products liability. The writer has attempted to answer many of the questions left unanswered and to analyze the changes made by the Mississippi Products Liability Act. While the interpretations of the specific sections of the Act will no doubt be debated for quite some time by lawyers and jurists alike, the ultimate interpretation is left to the Mississippi Supreme Court.

---

[328] *See supra* notes 299-315 and accompanying text.

OBTAINING A PATIENT'S CONSENT TO MEDICAL TREATMENT: INFORMED CONSENT UNDER MISSISSIPPI LAW

"Who shall decide when doctors disagree?"
- *Alexander Pope*[1]

By looking at the law of informed consent, it appears that the answer to this question in Mississippi is that the patient will decide when doctors disagree, and will even decide when doctors do agree. A physician has the affirmative duty to disclose known risks and potential side effects of any treatment to the patient, and must almost always obtain the patient's informed consent before administering any treatment.[2] The doctrine of "informed consent" as an issue unto itself emerged on the scene of American jurisprudence in the late 1950's and early 1960's.[3] Since that time, virtually every state has adopted some form of informed consent doctrine.[4] The doctrine of informed consent did not gain recognition in Mississippi until 1970, and the doctrine has consistently developed since that time.[5]

The most recent development in Mississippi in this area of the law occurred in the 1992 decision of *Barner v. Gorman*,[6] in which the Mississippi Supreme Court addressed, among other issues, the utilization of commonly-used medical forms as a method of obtaining a patient's informed consent.[7] This Article seeks to examine the doctrine of medical informed consent in Mississippi and the changes to that doctrine brought about by the *Barner v. Gorman* decision.[8]

---

[1] ALEXANDER POPE, *Epistle III, To Lord Allen Bathurst, in* EPISTLES TO SEVERAL PERSONS (MORAL ESSAYS) 114 (1963).

[2] PAUL S. APPLEBAUM ET AL., INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE 13 (1987). *See generally* Jon F. Merz, *On a Decision-Making Paradigm of Medical Informed Consent*, 14 J.LEGAL MED. 231 (1993) (proposing that requirement of informed consent needs objective standard for disclosures based on information of how patients make decisions).

[3] RUTH R. FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT 86 (1986).

[4] ARNOLD J. ROSOFF, INFORMED CONSENT: A GUIDE FOR HEALTH CARE PROVIDERS 75-185 (1981) (containing state-by-state discussion of informed consent cases).

[5] There have been at least 15 decisions in Mississippi concerning informed consent since 1970. *See infra* notes 6, 12, 21, 22, 38, 52, 68, 71, 106, 120, and accompanying text.

[6] 605 So. 2d 805 (Miss. 1992).

I. THE INDIVIDUAL RIGHT OF PRIVACY AS THE BASIS OF INFORMED CONSENT

"Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."[9]

As Justice Cardozo so aptly stated some eighty years ago, the origin of informed consent actions springs from an individual's right to privacy.[10] More specifically, before the birth of the modern consent action, virtually all courts based their decisions on the tort of assault and battery.[11] In Mississippi, an individual's right to privacy originates from the state common law[12] and is empowered by the state constitution of 1890.[13] The Mississippi Supreme Court has noted that the informed consent rule is the "bedrock of [Mississippi's] respect for the individual's freedom from unwanted bodily intrusions no matter how well intended."[14] Following the supreme court's lead, the Mississippi Legislature has adopted various statutes pertaining to a person's informed consent to medical treatment.[15]

---

[7] *Barner*, 605 So. 2d at 808.

[8] Authors' Note: We also hope that this Article will serve practical needs of the attorney who is unfamiliar with the Mississippi informed consent doctrine.

[9] Schloendorff v. Society of New York Hosp., 105 N.E. 92, 93 (N.Y. 1914) (citing Pratt v. Davis, 79 N.E. 562 (Ill. 1906)). In *Schloendorff*, a physician removed a tumor from a woman without first obtaining her consent to do so. *Id.* Cardozo specifically noted that the case was one of trespass (to the person) instead of negligence. *Id.* Cardozo's opinion in this case has been widely cited in many written works on informed consent. FADEN & BEAUCHAMP, *supra* note 3, at 123.

[10] *See, e.g.,* Rolater v. Strain, 137 P. 96, 97 (Okla. 1913); Mohr v. Williams, 104 N.W. 12, 14 (Minn. 1905), *overruled on other grounds by* Genzel v. Halvorson, 80 N.W.2d 854 (Minn. 1957) ("The free citizen's greatest right, which underlies all others, the right to himself . . . necessarily forbids a physician or surgeon . . . to violate without permission the bodily integrity of his patient . . . ."). *See generally* FADEN & BEAUCHAMP, *supra* note 3, at 121-25 (discussing this doctrine specifically citing above cases). Interestingly, the Hippocratic Oath does not mention that a physician should obtain his patient's informed consent. *Id.* at 61. However, it does discuss the importance of truthfulness in dealing with the patient. *Id.*

[11] *See generally* JAMES E. LUDLAM, INFORMED CONSENT 19-23 (1978) (discussing early informed consent cases based on assault and battery); ROSOFF, *supra* note 4, at 1-4 (discussing assault and battery as early basis for consent actions); W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 18, at 120 (5th ed. 1984).

Building from the invasion of privacy foundation, courts across the nation have taken different routes in their development of informed consent. Some courts remain with the view that the actions still lie within the battery context,[16] while others have based informed consent actions on legal theories such as actions in contract[17] or breach of fiduciary relationship.[18] However, the most modern and widely accepted viewpoint is that an action for lack of informed consent is a separate independent tort based on general tort principles.[19] While recognizing that violation of the informed consent rule constitutes battery,[20] the Mississippi Supreme Court has followed this trend and appears to base the doctrine more heavily upon general tort principles.[21] As a result, a claimant asserting lack of informed consent in Mississippi must meet a negligence-type standard in order to prevail.[22]

---

[12] Fox v. Smith, 594 So. 2d 596, 604 (Miss. 1992); *In re* Brown, 478 So. 2d 1033, 1040 (Miss. 1985); Deaton v. Delta Democrat Publishing Co., 326 So. 2d 471, 473 (Miss. 1976).

[13] MISS. CONST. art. III, § 32 (stating that "[t]he enumeration of rights in [the Mississippi Constitution] shall not be construed to deny and impair others retained by, and inherent in, the people"); *see, e.g., Fox*, 594 So. 2d at 604; *Brown*, 478 So. 2d at 1040.

[14] *Fox*, 594 So. 2d at 604 (citing *Brown*, 478 So. 2d at 1040).

[15] MISS. CODE ANN. §§ 41-41-3 to -151 (Supp. 1992) (enumerating who may give consent for others, requirements for consent to abortions, provisions for court to consent for other's treatment, etc.). The Legislature has used informed consent statutes to regulate a woman's access to abortion services. MISS. CODE ANN. §§ 41-41-33, -53 (1993); Barnes v. Mississippi, 992 F.2d 1335 (5th Cir.) (upholding constitutionality of requirement that unemancipated minor obtain consent of parents in order to obtain abortion), *cert. denied*, 114 S. Ct. 468 (1993); Barnes v. Moore, 970 F.2d 12 (5th Cir.) (upholding constitutionality of 24-hour waiting period; mandatory disclosure of specific information regarding abortion procedure), *cert. denied*, 113 S. Ct. 656 (1992). It is ironic that a doctrine such as informed consent, based on the right of privacy, is used to regulate the legal right of abortion, which is also based upon the right of privacy. *See* Roe v. Wade, 410 U.S. 113 (1973).

[16] *See, e.g.,* Gray v. Grunnagle, 223 A.2d 663 (Pa. 1966), *on reh'g*, 228 A.2d 735 (Pa. 1967); Cardwell v. Bechtol, 724 S.W.2d 739, 750 (Tenn. 1987); Woodbury v. C.B. Courtney, 391 S.E.2d 293, 295 (Va. 1990).

[17] Richard E. Shugrue & Kathryn Linstromberg, *The Practitioner's Guide to Informed Consent*, 24 CREIGHTON L. REV. 881, 884 (1991). Consent actions based in contract seem to occur most often when elective or cosmetic surgery is involved, and the claim is usually based upon a "bargained for" result which the patient did not receive. *See, e.g.,* Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1337 (5th Cir. 1992)

(recognizing no such contractual liability without express agreement for particular service or cure), *cert. denied*, 113 S. Ct. 812 (1992); Anisodon v. Superior Court, 285 Cal. Rptr. 539, 544 (Dist. Ct. App. 1991) (requiring express agreement); Depenbrok v. Kaiser Found. Health Plan, 144 Cal. Rptr. 724 (Dist. Ct. App. 1978) (same). Mississippi has yet to specifically address whether or not a medical malpractice action may be brought in contract. Hudson v. Parvin, 582 So. 2d 403, 409 (Miss. 1991); *see also* Walton v. Bourgeois, 512 So. 2d 698, 702 (Miss. 1987) (holding res judicata barred medical malpractice action when based on same facts as earlier contract action that was dismissed).

[18] Shugrue & Linstromberg, *supra* note 17, at 889-90. Some see the physician-patient relationship marked by such dependency and inequality of power as a fiduciary relationship. *See, e.g.,* Rajnowski v. Saint Patrick's Hosp., 564 So. 2d 671, 681 (La. 1990); State *ex rel.* Woytus v. Ryan, 776 S.W.2d 389, 393 (Mo. 1989); Gates v. Jensen, 595 P.2d 919, 922-23 (Wash. 1979).

[19] FAY A. ROZOVSKY, CONSENT TO TREATMENT: A PRACTICAL GUIDE 6 (1984). *See also* FADEN & BEAUCHAMP, *supra* note 3, at 29 (acknowledging viewpoint that battery theory, as opposed to negligence, is useful only in limited situations); APPLEBAUM ET AL., *supra* note 2, at 118 (stating negligence theory is more beneficial to patients than battery theory).

[20] *In re Brown*, 478 So. 2d at 1040 (Miss. 1985). In *In re Brown*, the Mississippi Supreme Court recognized that medical procedures performed without a patient's informed consent constitute a battery. *Id.*

[21] Ross v. Hodges, 234 So. 2d 905, 908-09 (Miss. 1970). In discussing the consent cause of action, the court spoke of the action as based in tort and applied general tort principles. *Ross*, 234 So. 2d at 908. Furthermore, it is interesting to note that the Mississippi court ruled that a cause of action based upon lack of informed consent would be governed by the statute of limitations which controls general negligence claims, and not by the statute of limitations applicable to an assault and battery claim. *Id.*

[22] *See* Phillips v. Hull, 516 So. 2d 488, 492 (Miss. 1987); Marshall v. The Clinic for Women, P.A., 490 So. 2d 861, 865 (Miss. 1986). The basic elements of a negligence cause of action are (1) duty (standard of care), (2) breach of that duty, (3) proximate causation, and (4) injury to the plaintiff. Lyle v. Mladinichi, 584 So. 2d 397, 398-99 (Miss. 1991); May v. V.F.W. Post No. 2539, 577 So. 2d 372, 375 (Miss. 1991).

II. PHYSICIAN'S DUTY TO OBTAIN INFORMED CONSENT AND BREACH THEREOF

A. Origin of the Duty

Although the case law on informed consent in Mississippi is not extremely abundant, there has been a steady progression of opinions in this area from the Mississippi Supreme Court over the last two decades.[23] The first case in Mississippi in which the court firmly recognized the lack of obtaining a patient's informed consent as a basis for liability was the 1970 decision of *Ross v. Hodges*.[24] Pursuant to her doctor's recommendations, Mrs. Veronica M. Ross underwent surgery for the removal of a skin tumor located on her scalp.[25] During surgery, the trephine saw used by Dr. Hodges unexpectedly cut through some of the diseased bone and slightly lacerated Mrs. Ross' brain.[26] The laceration caused Mrs. Ross to suffer paralysis over the entire left side of her body.[27]

Mrs. Ross brought suit against Dr. Hodges for medical negligence and the failure to obtain her consent to perform the operation.[28] The Mississippi Supreme Court, citing other jurisdictions,[29] recognized informed consent for the first time as a separate basis for tort liability.[30] The court stated that

---

[23] *See supra* note 3 and accompanying text.

[24] *Ross*, 234 So. 2d at 905.

[25] *Id.* at 907.

[26] *Id.* at 907-08.

[27] *Id.* at 908. The incision was only about one centimeter in length, but it lacerated the dura and the cortex of the brain. *Id.*

[28] *Id.* at 906. The tort of medical negligence or negligent surgical procedure is separate and distinct from the claim of lack of informed consent. *Phillips*, 516 So. 2d at 494.

[29] *Ross*, 234 So. 2d at 906. The court relied upon the cases of Shetter v. Rochelle, 409 P.2d 74 (Ariz. Ct. App. 1965), *modified*, 411 P.2d 45 (Ariz. Ct. App. 1966), and Grojean v. Spenser, 140 N.W.2d 139 (Iowa 1966), *overruled by* Pauscher v. Iowa Methodist Medical Ctr., 408 N.W.2d 355 (Iowa 1987), in establishing the informed consent doctrine in Mississippi. *Id.*

[30] *Ross*, 234 So. 2d at 908. The court stated:

> The basis of . . . tort liability is that a physician is under a duty under some circumstances to warn his patient of the known risks of proposed treatment or

the crucial question in this cause of action was whether Dr. Hodges disclosed enough information to Mrs. Ross about the operation to constitute informed consent.[31] The court further stated that Mrs. Ross had the burden of proving the professional standard to which Dr. Hodges would be bound.[32] After testimony of several local medical experts, the court found that Dr. Hodges had followed reasonable professional standards concerning the disclosure to Mrs. Ross.[33] The court relied on the fact that Dr. Hodges had told Mrs. Ross his diagnosis and explained the procedure of the operation.[34] According to the court, the risk of injury during this operation was not great, and all reasonable people are aware of the existence of some risk involved in any surgery.[35] Although this case marked the birth of the doctrine of informed consent in Mississippi, thus affording more protection to patients, the court clearly indicated

---

> surgery, so that the patient will be in a position to make an intelligent decision as to whether to submit to such treatment or surgery.

Id. This standard has been quoted in virtually every informed consent case decided in Mississippi since *Ross*. *See, e.g., Marshall*, 490 So. 2d at 863; Cole v. Wiggins, 487 So. 2d 203, 205 (Miss. 1986); Reikes v. Martin, 471 So. 2d 385, 392 (Miss. 1985).

[31] *Ross*, 234 So. 2d at 909.

[32] *Id.* From 1946 until 1985, and thus applicable to *Ross* at that time, Mississippi followed a "Locality Rule," under which a doctor's standard of care was measured by the "degree of skill ordinarily possessed by physicians in good standing in the same locality. . . ." Hill v. Stewart, 209 So. 2d 809, 812 (Miss. 1968); Copeland v. Robertson, 112 So. 2d 236, 241 (Miss. 1959); Sanders v. Smith, 27 So. 2d 889, 891-92 (Miss. 1946). In 1985, the Mississippi Supreme Court adopted a national standard of care. Hall v. Hilbun, 466 So. 2d 856, 874 (Miss. 1985). However, the court later noted that the "Locality Rule" had not been completely abolished in Mississippi. Turner v. Temple, 602 So. 2d 817, 823 (Miss. 1992). The court, in *Turner*, stated that an expert witness testifying as to the standard of care of a physician "must be familiarized with the facilities, resources, services and options available" to physicians in that area. *Turner*, 602 So. 2d at 824 (citing *Hall*, 466 So. 2d at 875). Therefore, while the plaintiff does not have to bring forth evidence of the standard of care as specifically applied to the local area, their experts must be familiar with the resources available to the practicing physician in that area. *Id.*

[33] *Ross*, 234 So. 2d at 909.

[34] *Id.*

[35] *Id.*

that it would be sympathetic to the concerns of the physicians in such cases.[36]

B. *Materiality of the Risk or "Prudent Patient I"*[37] *Standard*

How is a court to determine what information must be disclosed to the patient? The Mississippi Supreme Court definitively answered this question in the 1987 case of *Phillips v. Hull*.[38] The plaintiff, Mrs. Phillips, filed suit against Dr. Calvin Hull for negligent surgical procedure and lack of informed consent. Dr. Hull performed a tubal ligation on Mrs. Phillips that was unsuccessful. Mrs. Phillips later conceived a child that she contended suffered from cerebral palsy. As a result, Mrs. Phillips maintained that Dr. Hull was legally at fault for not informing her of the possibility of an unsuccessful sterilization. In deciding this case, the Mississippi court thoroughly explained the standard for determining the doctor's duty to his patient in the area of informed consent.[39]

The court noted that two main standards existed in American jurisprudence for determining a doctor's duty in obtaining a patient's consent.[40] The first test, known as the

---

[36] *Id.* at 909-10. The court acknowledged that the physician's primary concern during consultation with his patient is the treatment of that patient, and not liability considerations. *Id.*

[37] Authors' Note: This standard is named "Prudent Patient I" for purposes of clarity within this work. The Mississippi Supreme Court has effectively adopted two separate "prudent patient" tests in the area of informed consent actions. One test determines the standard of care that physicians owe to their patients, and the other test determines causation. Both tests are discussed in this work, with the standard of care test labeled "Prudent Patient I" and the causation test labeled "Prudent Patient II." We hope this nomenclature will result in less confusion in the understanding of the Mississippi informed consent doctrine.

[38] 516 So. 2d 488 (Miss. 1987).

[39] *Phillips*, 516 So. 2d at 492-93.

[40] *Id.* The "reasonable" or "prudent" patient standard is based upon the patient's autonomy and right to self-determination. Shugrue & Linstromberg, *supra* note 17, at 884-85. Surprisingly, the "reasonable patient" standard is a minority view, and most states rely upon standards which center upon whether a reasonable medical practitioner would have revealed the information to the patient, without regard to the impact upon the patient's decision-making ability. *Id.* at 885 n.19. The Mississippi court alluded to such a standard in *Ross v. Hodges*, and it noted that Dr. Hodges had met the professional standards of local neurosurgeons. *Ross*, 234 So. 2d at 909. The court

"professional medical" or "traditional"[41] standard, focused on what information a "reasonable medical practitioner" would disclose under the circumstances.[42] Under this standard, expert medical testimony was usually necessary to ascertain what the standard was and if it had been breached.[43] The second standard, known as the "materiality of the risk" or "prudent patient" standard,[44] involved whether a "reasonable person in the patient's position would have considered the risk significant in making his or her decision."[45] The court noted that expert testimony is not necessarily required with this test, as it is a question for the jury to determine.[46] The Mississippi Supreme Court clearly stated that the second of the two tests, the "prudent patient" standard, would apply in Mississippi for determining what information should be communicated from the doctor to the patient.[47] Therefore, the Mississippi "Prudent Patient I" test for determining the standard of care or duty owed by the physician to a patient is whether a reasonable

---

recognized this fact in the later opinion of *Phillips v. Hull*, but reiterated that the court had adopted a patient-based disclosure standard. *Phillips*, 516 So. 2d at 493; Reikes v. Martin, 471 So. 2d 85, 392 (Miss. 1989)). Likewise, the *Ross* decision also alluded to a patient-based standard when it noted that every reasonable person understands that there are always some risks involved in surgery. *Ross*, 234 So. 2d at 909.

[41] *Phillips*, 516 So. 2d at 492-93.

[42] *Id.* The professional community standard has been criticized for three reasons: (1) the medical profession has no uniform standard of disclosure for patients; (2) where some standard does exist, it usually provides too little information for the patient to make an informed decision; and (3) the professional standard complicated the patient's responsibility to present expert testimony. Shugrue & Linstromberg, *supra* note 17, at 899 n.91. These problems have led many courts to adopt a patient-oriented standard. *Id.*

[43] *Phillips*, 516 So. 2d at 492; *see infra* notes 66-89 and accompanying text.

[44] Canterbury v. Spence, 464 F.2d 772, 787 (D.C. Cir.) (utilizing "prudent patient" standard for first time), *cert. denied*, 409 U.S. 1064 (1972).

[45] *Phillips*, 516 So. 2d at 492.

[46] *Id.*

[47] *Id.* at 493. Although the earlier case of Reikes v. Martin, 471 So. 2d 385, 392 (Miss. 1985), had mentioned the "prudent patient" standard, the court did not formally adopt that standard until its decision in *Phillips*. Later, in the case of Hudson v. Parvin, 582 So. 2d 403 (Miss. 1991), the court restated that Mississippi followed the objective "prudent patient" standard. *Hudson*, 582 So. 2d at 410. The *Hudson* court noted that "[t]he test is based on the patient's need rather than the standard in the medical profession." *Id.*

patient would have thought certain information was important in making a decision to accept or reject the treatment. If an informed consent plaintiff proves that his physician failed to inform him of such material information, then he has effectively put together the first two pieces of the tort puzzle, duty and breach of duty. Moreover, the adoption of the prudent patient test was in line with a statement the court made in the earlier decision of *Ross v. Hodges*. In *Ross*, the court's *statement* that any reasonable patient understood that there was some amount of risk involved in surgery[48] foreshadowed the explicit adoption of an objective standard.

C. Specific Information Physicians Must Disclose - The Disclosure Checklist

The "prudent patient" standard may be fine for jurists, but what of the medical practitioner? How is he to know what information he is legally required to disclose to his patient? The *Phillips v. Hull* decision clarified precisely what information is required by the objective "Prudent Patient I" standard for obtaining a patient's informed consent. In *Phillips*, the court sought to expound upon the nature of the information required to be disclosed by Mississippi physicians. The court quoted from a hospital manual that listed specific items of information that most state courts have held must be disclosed.[49] These items were:

1) diagnosis,
2) nature and purpose of the proposed treatment,
3) risks and consequences of the proposed treatment,
4) probability that the proposed treatment will be successful,
5) feasible treatment alternatives, and
6) prognosis if the proposed treatment is not given.[50]

---

[48] *Ross*, 234 So. 2d at 909.

[49] *Phillips*, 516 So. 2d at 493. The court obtained this list from P. LASKY, 11B HOSPITAL LAW MANUAL: CONSENT TO MEDICAL AND SURGICAL PROCEDURES (1986). *Id.*

[50] *Id.* Many courts across the country use these types of information as requirements for the physician to follow with regard to disclosure. Michael J. Farrell, *Medication Malpractice: Claims, Culprits, and Defenses*, 16 AM. J. TRIAL ADVOC. 65, 78-

In *Phillips*, the court merely quoted this list from the hospital manual without much discussion. However, in the subsequent decision of *Palmer v. Biloxi Regional Medical Center, Inc.*,[51] the court explicitly stated that the doctor must disclose this information to the patient. The court also noted that the applicability of each item in the list is "determined on a case-by-case basis, depending upon the particular facts."[52] If the physician can present evidence that he gave the patient information concerning each item in the checklist, that may be sufficient as a defense to an assertion by the patient that the information given to the patient was inadequate. However, since disclosure of medical information may confuse a layman, the doctor must relay the information in understandable terms.[53]

D. Exceptions to the Physician's Duty

A physician's duty to disclose material risks to his patient before administering treatment is not absolute.[54] The Mississippi court has recognized that certain exceptions to this duty exist. For example, where an emergency situation does not permit the physician to properly obtain consent, the physician's duty to obtain consent is relieved.[55] This point is illustrated by the Mississippi decision of *Latham v. Hayes*.[56] The plaintiff in *Latham* had a supposed "simple" surgery performed on her ear

---

79 (1992) (noting same list is used by most states); ROSOFF, *supra* note 4, at 41-51 (discussing elements of list).

[51] 564 So. 2d 1346 (Miss. 1990).

[52] *Palmer*, 564 So. 2d at 1363.

[53] *Id.* The court noted that even if a physician provided a patient with information regarding each of these categories, there may still be a question of informational complexity. *Id.* The doctor must relay the information in "lay terms," since a doctor's "lengthy polysyllabic discourse does not serve the patient's interest." *Id.* (citing Cobbs v. Grant, 502 P.2d 1, 11 (Cal. 1972)).

[54] *See* Alan Meisel, *The "Exceptions" to the Informed Consent Doctrine: Striking a Balance Between Competing Values in Medical Decisionmaking*, 1979 WIS. L. REV. 413, 433-70 (discussing exceptions to informed consent rule).

[55] *Id.* at 434; *see* John Norman, *Physicians and Surgeons: Informed Consent*, 20 OKLA. L. REV. 214, 215-16 (1967) (listing emergency as exception to informed consent rule).

[56] 495 So. 2d 453 (Miss. 1986).

for the removal of ear polyps. During the operation, doctors found a life-threatening growth near the plaintiff's brain. Due to the precarious position of the growth, the physician decided to remove the growth without the patient's consent. During the removal operation, the doctor damaged a nerve, causing paralysis to the left side of the plaintiff's face. The patient brought suit against the physician, claiming medical negligence and lack of informed consent. The court determined that a reasonable prudent patient, aware of all the facts (including the location of the growth and the resulting danger) would have consented to the removal surgery.[57] In essence, the court established emergency situations as an exception to the requirement that a physician obtain his patient's informed consent to treatment.[58]

Although no other exceptions to the duty of disclosure have arisen in factual situations before the Mississippi Supreme Court, cases have recognized the existence of other exceptions, including therapeutic privilege[59] and waiver.[60] Likewise, the court has acknowledged that a physician may not need to inform his patient when risks are immaterial[61] or unexpected,[62] or when the patient is incapacitated.[63] While Mississippi case law is sparse in its coverage of exceptions to the informed consent doctrine, there is a plethora of case law[64] and secondary authority[65] from other jurisdictions on the topic.

---

[57] *Latham*, 495 So. 2d at 458. Four justices dissented from the majority opinion in *Latham*, stating that the majority's reliance upon the reasonable prudent patient standard was misplaced. *Id.* at 460 (Anderson, J., dissenting). According to the dissenters, a reasonably prudent patient would have had no way of knowing of the danger of the growth because the doctor did not discover it until after consent for the initial procedure was given. *Id.* at 461 (Anderson, J., dissenting). Instead, the dissenters argued, the physician should be excused from liability because the existence of the growth was undetectable when the patient consented to the initial procedure. *Id.* (Anderson, J., dissenting).

[58] *Id.* at 458. Although the court in *Latham* did not specifically label the justification for nondisclosure as an "emergency exception," it seems clear that this was what was intended, and later cases have recognized that the emergency exception is applicable in Mississippi. *See Palmer*, 564 So. 2d at 1364; *Phillips*, 516 So. 2d at 494 (citing *Latham*, 495 So. 2d at 458).

[59] *Palmer*, 564 So. 2d at 1364; *see also* David E. Seidelson, *Medical Malpractice Actions Based on Lack of Informed Consent in "Full-Disclosure" Jurisdictions: The Enigmatic Affirmative Defense*, 29 DUQ. L. REV. 39, 39 (1990) (addressing therapeutic privilege and duty of disclosure as "unitary defense").

[60] *Palmer*, 564 So. 2d at 1364; *see also Phillips*, 516 So. 2d at 494 (alluding to possibility of implied consent from failure to object to treatment); Meisel, *supra* note 54, at 453-60 (discussing waiver exception).

E. Plaintiff's Burden of Proof

1. What is required?

The Mississippi Supreme Court has clearly stated that the plaintiff must prove by a preponderance of the evidence all elements of an informed consent claim.[66] The court has not been so clear, however, as to the method of proving these elements.

---

[61] *Palmer*, 564 So. 2d at 1364 (citing Henderson v. Milobsky, 595 F.2d 654 (D.C. Cir. 1978)); *see* Farrell, *supra* note 50, at 82 (discussing materiality in context of medication malpractice).

[62] *Palmer*, 564 So. 2d at 1364.

[63] *Id.*; *see also* Canterbury v. Spence, 464 F.2d 772, 788 (D.C. Cir.) (recognizing exception when patient is incapable of consenting), *cert. denied*, 409 U.S. 1064 (1972).

[64] *See, e.g.,* Korman v. Mallin, 858 P.2d 1145, 1150 (Alaska 1993) (categorizing physician's duty to obtain informed consent as qualified privilege to withhold information); Culbertson v. Mernitz, 602 N.E.2d 98, 103 (Ind. 1992) (noting that 1992 Code of Medical Ethics recognizes exceptions to general requirement of informed consent); Pauscher v. Iowa Methodist Med. Ctr., 408 N.W.2d 355, 360 (Iowa 1987) (enumerating six exceptions that establish defense to informed consent action).

[65] *See, e.g., Developments in the Law — Medical Technology and the Law*, 103 HARV. L. REV. 1643, 1674-76 (1990) (discussing informed consent in context involving incompetents and "right to die" situations); Martin R. Studer, *The Doctrine of Informed Consent: Protecting the Patient's Right to Make Informed Health Care Decisions*, 48 MONT. L. REV. 85, 93-94 (1987) (discussing lack of duty to disclose risks inherent in common procedures); D. Michael Wallach & Steven J. Berry, *Informed Consent in Texas: A Proposal for Reasonableness and Predictability*, 18 ST. MARY'S L.J. 835, 848-50 (1987) (discussing exceptions generally and therapeutic privilege specifically).

[66] *See* Palmer v. Biloxi Regional Med. Ctr., Inc., 564 So. 2d 1346, 1363 (Miss. 1990); Phillips v. Hull, 516 So. 2d 488, 491 (Miss. 1987). Merely establishing the tort elements may not always be sufficient, for the court in *Palmer* noted that the basis upon which a claim of informed consent is brought may affect the required proof. *Palmer*, 564 So. 2d at 1363-64. For example, an informed consent claim based on incompetency may require proof of the basis of the incompetence, and a claim based upon the involuntariness of the given consent may require proof of coercion used in obtaining the consent. *Id.* at 1364.

In 1986, the Mississippi Supreme Court issued two decisions that focused on the subject of expert testimony in informed consent cases. The first of these cases was *Cole v. Wiggins*.[67] Mr. Cole sued Dr. Wiggins and alleged that the doctor had not properly obtained his consent to amputate his entire finger.[68] This case allowed the court to clarify its position concerning expert testimony. While noting that expert medical testimony is normally necessary to establish the physician's duty of care in a medical malpractice claim,[69] the court explicitly stated that "[n]o expert testimony was required to establish what communication transpired" between the doctor and the patient.[70] The court justified this distinction by reasoning that the actual communications that took place between the doctor and the patient were factual matters within the knowledge of the jury, whereas normally a physician's duty of care is beyond the knowledge of a layman.[71]

The court also addressed a closely related issue concerning the use of expert testimony in the case of *Marshall v. The Clinic for Women, P.A.*[72] The plaintiff, Mrs. Marshall, had sued the clinic because of complications arising from her use of an intrauterine contraceptive device.[73] Mrs. Marshall did not produce any expert witnesses to testify on the standard of care required of medical doctors.[74] For that reason the court granted summary judgment and dismissed Mrs. Marshall's case, and she appealed.[75] On appeal, the supreme court noted that some jurisdictions follow the rule that when a physician completely fails to warn a patient of the risks of treatment, there is a prima facie violation of the physician's duty to disclose.[76] Under this standard, the physician has the burden of proving that the failure to disclose was according to proper standards, and thus was justified.[77] Therefore, since the plaintiff is relieved of the burden to establish the physician's duty, she is not required to produce expert witnesses to establish that duty.[78] The plaintiffs argued that this doctrine should apply in Mississippi, and that the physician should bear the burden of showing justification for non-disclosure.[79] The Mississippi Supreme Court refused to address the applicability of this reasoning in Mississippi because, by the plaintiff's own admission, the doctor had discussed with the plaintiff some of the side effects of the contraceptive treatments.[80] The court therefore determined that the doctrine was not applicable in this case since there was not a complete failure to warn.[81] As a result, the court held that the plaintiffs had failed to meet their requirement to produce expert testimony on the appropriate standard of care the physician had allegedly breached.[82] In so holding for the defendant, the court referred to the fact that "standard of care" was the first of the four elements required to be proven in any negligence case.[83] The court decided that since the plaintiff failed to establish the standard of care, by expert testimony or otherwise, the trial court's grant of a directed verdict in favor of the defendant was proper.[84]

---

[67] 487 So. 2d 203 (Miss. 1986).

[68] *Cole*, 487 So. 2d at 204. The court reversed the trial court's decision which had granted summary judgment to the defendant physician. *Id.* at 207.

[69] *Id.* at 205.

[70] *Id.* at 206; *see also* Thompson v. Barnett, 734 F. Supp. 751, 754 (S.D. Miss. 1989) (holding where issue is "whether the physician did in fact advise the patient of the risk, medical testimony is not necessarily required"); KEETON ET AL., *supra* note 11, at 191 n.68 (stating jurisdictions which apply "reasonable patient standard of disclosure" usually do not require expert testimony on scope or breach of standard). *See generally* Daniel E. Feld, Annotation, *Necessity and Sufficiency of Expert Evidence to Establish Existence and Extent of Physician's Duty to Inform Patient of Risks of Proposed Treatment*, 52 A.L.R. 3D 1084 (1973) (surveying different states' requirements of expert evidence in informed consent cases).

[71] *Cole*, 487 So. 2d at 206.

[72] 490 So. 2d 861 (Miss. 1986).

[73] *Marshall*, 490 So. 2d at 862-63. Mrs. Marshall suffered from pelvic inflammatory disease, which resulted in severe abdominal pain. *Id.* at 863. She later developed cysts, which were subsequently removed. *Id.*

---

[74] *Id.* at 864. In a medical malpractice case, the standard of care "can be established only by [expert] testimony unless the matter in issue is within the common knowledge of laymen." *Id.* (citing Copeland v. Robertson, 112 So. 2d 236, 241 (Miss. 1959), *overruled by* Hall v. Hilbun, 466 So. 2d 856 (Miss. 1985)).

[75] *Marshall*, 490 So. 2d at 861.

[76] *Id.* at 864 (citing Natanson v. Kline, 354 P.2d 670 (Kan. 1960); Calabrese v. Trenton State College, 392 A.2d 600 (N.J. Super. Ct. App. Div. 1978), *aff'd* 413 A.2d 315 (N.J. 1980)). The premise begins with the assumption that the physician's duty of disclosure is imposed by law and not by medical consensus. Therefore, departure from medical norms is not required for a physician to breach his duty. The failure to disclose any of the known and existing risks of treatment, when those risks would affect the reasonable prudent patient's decision to submit to such treatment, would then be a prima facie violation of the physician's duty. *Id.* (citing *Calabrese*, 392 A.2d at 606).

[77] *Marshall*, 490 So. 2d at 864 (citing *Calabrese*, 392 A.2d at 606).

[78] *Id.*

[79] *Id.*

[80] *Id.* at 864-65. Mrs. Marshall testified that Dr. Byars, the defendant, had cautioned her about excessive bleeding and other symptoms at the time he inserted the intrauterine device. *Id.*

[81] *Marshall*, 490 So. 2d at 865.

In the previously-mentioned case of *Phillips v. Hull*, the supreme court seemed to change its position on whether a plaintiff must provide expert testimony to establish the standard of care and breach thereof. As discussed earlier, in *Phillips*, the court formally adopted the "Prudent Patient I" test for determining the duty and breach of duty in informed consent cases.[85] In adopting this test, the court quoted from the South Carolina Court of Appeals decision of *Hook v. Rothstein*,[86] in which the court stated:

> Unlike the professional standard, the lay standard does not ordinarily require expert testimony as to medical standards to establish the physician's duty to disclose. Rather, it is for the jury to determine whether a reasonable person in the patient's position would have considered the risk significant in making his or her decision.[87]

Not only has the Mississippi Supreme Court rejected the need for expert testimony regarding what communications took place between the physician and patient,[88] but it also has seemingly abolished the absolute need for expert testimony on the issues of duty and breach of duty.[89]

---

[82] *Id.* at 865.

[83] *Id.* The court for the first time formally listed the four traditional elements of a tort claim and their applicability to the informed consent cause of action. *Id.* Thus, the court firmly established a separate tort of lack of informed consent based on medical negligence. *See supra* note 19 and accompanying text.

[84] *Marshall*, 490 So. 2d at 865.

[85] *See supra* note 40 and accompanying text.

[86] 316 S.E.2d 690, 695 (S.C. Ct. App. 1984).

[87] *Phillips*, 516 So. 2d at 492 (quoting *Hook*, 316 S.E.2d at 695).

[88] *Cole*, 487 So. 2d at 206.

[89] *See supra* note 71 and accompanying text.

III. CAUSATION

A. "Prudent Patient II" Standard

In 1985, the supreme court defined the standard of determining causation for informed consent actions in *Reikes v. Martin.*[90] In that case, Laverne Martin suffered from the after-effects of radiation treatment for uterine cancer.[91] Although many of the side effects disappeared after her treatment ended, the lesions on her back did not.[92] As a result, Mrs. Martin filed suit against her doctors alleging, among other things, lack of informed consent.[93] In reaching a decision on the causation issue, the court discussed the two main types of tests used by most jurisdictions in determining whether a lack of informed consent was the cause of the plaintiff's injury.[94]

The first type of test was subjective, and required the plaintiff to prove that had he known the true risks involved, he would not have undergone the treatment.[95] The other major type of test, known as the "prudent patient" or "materiality of the risk" test, involved an objective analysis of whether a reasonably prudent patient would have chosen the treatment if fully informed by the physician, regardless of what the actual plaintiff might have done.[96] The court chose to adopt the objective "prudent patient" test,[97] which allows a plaintiff to make hindsight decisions.[98] Several times the Mississippi Supreme Court has affirmed the use of the "Prudent Patient II" standard to determine causation in informed consent cases.[99]

---

[90] 471 So. 2d 385 (Miss. 1985).

[91] *Reikes*, 471 So. 2d at 388. Mrs. Martin's symptoms included nausea, diarrhea and severe sores on her lower back. *Id.*

[92] *Id.*

[93] *Id.* at 392.

[94] *Id.*; *see also Canterbury*, 464 F.2d at 790-91 (discussing same tests).

[95] *Reikes*, 471 So. 2d at 392 (citing Scott v. Bradford, 606 P.2d 554 (Okla. 1979); Wilkinson v. Vesey, 295 A.2d 676 (R.I. 1972)).

[96] *Reikes* 471 So. 2d at 392. The likelihood of confusion is increased when the court adopts here the "materiality of the risk" or "prudent patient" test for causation, where previously the court approved an objective standard identified by exactly the same name for determining the duty of care and breach of that duty. *See supra* note 37 and accompanying text.

[97] *Reikes*, 471 So. 2d at 393. The test asks whether a reasonably prudent patient, fully advised of the material known risks, would have consented to treatment. Latham v. Hayes, 495 So. 2d 453, 458 (Miss. 1986); *see also* Hitchcock v. United States, 665 F.2d

B. Proximate Cause

In *Palmer v. Biloxi Regional Medical Center, Inc.*,[100] the Mississippi Supreme Court stated that the burden of proof for causation in informed consent cases was two-tiered.[101] The court held that the first step was to prove causation under the "Prudent Patient II" standard, and the next step was to establish that the "treatment was the proximate cause of the worsened condition."[102] The court also stated that expert testimony would usually be necessary to establish this second part of the causation element.[103] In *Palmer*, the court found that there was no evidentiary showing that the operation on the plaintiff's fractured jaw was causally connected to her subsequent heart attack and death.[104] Therefore, the court affirmed the trial court's grant of summary judgment on that issue.[105] Thus, the supreme court, in *Palmer*, clarified the plaintiff's burden of proof on the issue of causation.

354, 362 (D.C. Cir. 1981) (discussing prudent patient test); Shugrue & Linstromberg, *supra* note 17, at 914 (noting that modern informed consent doctrine calls for objective analysis).

[98] *See Reikes*, 471 So. 2d at 393. "Subjectively, [the patient] may believe [that he would have refused treatment] with the 20-20 vision of hindsight, but we doubt that justice will be served by placing the physician in jeopardy of the patient's bitterness and disillusionment." *Id.* (quoting Cobbs v. Grant, 502 P.2d 1 (Cal. 1972)).

[99] *See, e.g.*, Hudson v. Parvin, 582 So. 2d 403, 410 (Miss. 1991); *Palmer*, 564 So. 2d at 1364; *Phillips*, 516 So. 2d at 493; *Latham*, 495 So. 2d at 458.

[100] 564 So. 2d 1346 (Miss. 1990).

[101] *Palmer*, 564 So. 2d at 1364.

[102] *Id.*

[103] *Id.* The exact language of the court was that "[g]enerally, proof of the latter subelement requires expert testimony that the defendant's conduct — not the patient's original illness or injury — led to the worsened condition." *Id.* Authors' Note: Our previous discussion of expert testimony concerned the burden of proof in regard to the standard of care and breach thereof. However, this case mentions expert testimony involving proof of proximate causation.

[104] *Id.* at 1363.

[105] *Id.* at 1365.

IV. EFFECT OF *BARNER V. GORMAN*

A. Facts

On August 12, 1992, the Mississippi Supreme Court rendered the latest Mississippi decision on the topic of informed consent in *Barner v. Gorman*.[106] In doing so, the court further explained what does and does not meet the definition of "informed consent."

In April of 1986, Matilda Barner underwent surgery for the removal of a cervical disk, following her injury in an automobile accident. As a memento of this surgery, Ms. Barner left the hospital with a keloid scar located on the front of her neck. Ms. Barner went to Dr. Douglas E. Gorman and discussed reconstructive surgery to treat and hopefully remove this scar. Dr. Gorman performed reconstructive surgery on Ms. Barner's neck, which resulted in an even larger keloid scar. After three failed attempts by Dr. Gorman to remove the scar using kenalog treatments, Barner filed suit against Dr. Gorman. Her complaint alleged medical malpractice on the part of Dr. Gorman, including the failure to properly obtain her informed consent for the procedure.

Prior to the reconstructive surgery, Ms. Barner had signed a form entitled "Consent to Operation, Anesthetic and Other Medical Services." The form was also signed by C. Lloyd, L.P.N., and was a commonly-used document in the medical profession for obtaining a patient's consent to medical treatment.

At trial, testimony conflicted as to exactly what information Dr. Gorman had relayed to Ms. Barner. Gorman testified that he had informed Ms. Barner specifically about the likelihood of "recurrent hypertrophy" scarring. In contrast, Ms. Barner stated that Dr. Gorman never mentioned the possibility of further scarring.

---

[106] 605 So. 2d 805 (Miss. 1992).

The trial court granted Dr. Gorman's motion for summary judgment, and Barner appealed to the Mississippi Supreme Court.

B. Use of Consent Forms

The Mississippi Supreme Court firmly acknowledged Dr. Gorman's duty to disclose to Ms. Barner all possible risks of the treatment, as well as to obtain her informed consent.[107] Furthermore, the court questioned the adequacy of the signed consent form as evidence that the informed consent of Ms. Barner was obtained prior to the reconstructive surgery. Other cases on informed consent in Mississippi show that consent forms have been valuable pieces of evidence in the past.

Although some earlier cases mentioned the use of consent forms by the medical profession,[108] the first case in which a consent form was an important factor was *Phillips v. Hull.*[109] In that case, the court held that the trial court's grant of summary judgment on the issue of informed consent was improper because conflicting testimony produced certain issues of fact. The court recognized the plaintiff's claim that the defendant doctor failed to inform her that the tubal ligation procedure would be unsuccessful, while the doctor in the case testified that he had communicated that risk to the plaintiff.

The court noted that there was no form admitted into evidence suggesting that the patient had been informed of the risks of the surgery. Again, the court found that the case was not proper for summary judgment "in the absence of any documentary evidence substantiating" the doctor's contention that he had obtained the patient's informed consent.[110] The court in *Phillips* recognized the need for some type of written evidence of the transfer of information from the medical practitioner to the patient.[111]

---

[107] *Barner*, 605 So. 2d at 807-08.

[108] Cole v. Wiggins, 487 So. 2d 203, 204, 207 (Miss. 1986); Ross v. Hodges, 234 So. 2d 905, 906 (Miss. 1970).

[109] 516 So. 2d 488 (Miss. 1987).

[110] *Phillips*, 516 So. 2d at 494.

[111] *Id.*

Consent forms took on new meaning in later Mississippi cases. For instance, in *Palmer v. Biloxi Regional Medical Ctr.*, the doctor involved in the case produced signed forms generally authorizing the medical treatment given.[112] The court, citing *Phillips*, stated that the forms were sufficient "documentary evidence" to allow the physician to meet his burden of proof in support of a motion for summary judgment.[113] Although this evidence is a prerequisite for the defendant in obtaining summary judgment, it alone does not necessarily mean success on such a motion. The *Palmer* court obviously strengthened the importance of consent forms for informed consent defendants. These forms would continue to become more vital as pieces of evidence.

In the 1991 case of *Hudson v. Parvin*,[114] the Mississippi Supreme Court again addressed this issue. In that case, the plaintiff signed two consent forms, and one of the forms stated specifically that tubal ligation operations could be unsuccessful and possibly fail to prevent pregnancy. The court held that since the plaintiff testified that she had read the form containing the information, her claim for lack of informed consent was nullified and the directed verdict of the trial court would stand.[115] Although the Mississippi Supreme Court had recognized the importance of consent forms over time, one recent opinion seemed to slightly limit this doctrine.

In *Fox v. Smith*,[116] the plaintiff claimed that the doctor had not obtained her consent to remove her intrauterine device (IUD) during an investigative procedure to determine the cause of certain abdominal pains. The defendant-doctor claimed that he had received consent and specifically relied on a single paragraph in a consent form signed by the plaintiff as the basis of his defense.[117] The paragraph stated that the patient agreed to the doctor's use of his professional discretion in determining the course of the procedure once surgery had begun.[118] The court stated that this paragraph in the consent form was not sufficient to warrant a directed verdict. The court reasoned that the patient's testimony of her express instructions to the doctor not to remove the IUD and the question of whether the removal of the IUD fit within the language of the consent form were adequate to create a question of fact so as to defeat a motion for directed verdict.[119] Although the court did not specifically find that the consent form was inadequate, it did show a willingness to carefully compare the content of the form to the facts of the case to establish whether the form indicated the existence of informed consent. In *Barner*, the court took this analysis one step further in favor of the patient.

---

[112] *Palmer*, 564 So. 2d at 1364.

[113] *Id.* at 1365 (citing *Phillips*, 516 So. 2d at 494).

[114] 582 So. 2d 403 (Miss. 1991).

[115] *Hudson*, 582 So. 2d at 411.

[116] 594 So. 2d 596 (Miss. 1992).

[117] *Fox*, 594 So. 2d at 605.

The court was quick to note that while a signed consent form "can be helpful," such a form "does not always indicate that a patient's consent was in fact *informed* consent."[120] The court went on to state that in order for an entry of summary judgment[121] to be proper, a party must have "documentary or verbal evidence substantiating the physician's claim" that informed consent was obtained.[122] Obviously, the court had changed its view on what material constituted "documentary evidence."[123]

---

[118] *Id.* The doctor in this case cited several decisions in support of his contention that the specific provision in the signed consent form precluded a battery action against him. *Id.*; *see, e.g.*, Davidson v. Shirley, 616 F.2d 224, 225 n.1, 228 (5th Cir. 1980); Winfrey v. Citizens & S. Nat'l Bank, 254 S.E.2d 725, 727-28 (Ga. Ct. App. 1979); Ipock v. Gilmore, 354 S.E.2d 315, 318 (N.C. App.), *cert. denied*, 358 S.E.2d 51, *cert. denied*, 358 S.E.2d 52 (N.C. 1987).

[119] *Fox*, 594 So. 2d at 605.

[120] *Barner*, 605 So. 2d at 808 (emphasis added).

[121] *See* MISS. R. CIV. P. 56; Cunningham v. Lanier, 589 So. 2d 133, 135-36 (Miss. 1991).

[122] *Barner*, 605 So. 2d at 808. Apparently, the testimony presented by Dr. Gorman in this case concerning what information was relayed to Ms. Barner was insufficient to constitute the "verbal" evidence that the court required. *Id.*

[123] *See Hudson*, 582 So. 2d at 411 (holding signed consent form constituted adequate documentary evidence to uphold directed verdict); *Palmer*, 564 So. 2d at 1365 (holding physician produced sufficient documentary evidence in signed consent form); *Phillips*, 516 So. 2d at 494 (establishing need for documentary evidence to prove consent). *But see Fox*, 594 So. 2d at 605 (stating that general consent form alone was insufficient for directed verdict in light of plaintiff's contrary testimony).

While determining that a simple signed waiver form was not necessarily adequate for obtaining informed consent, the court noted that the possible methods for properly obtaining such consent were virtually limitless. As possible methods for obtaining consent, the court recommended extensive communication between the physician and the patient and the patient's family, as well as the use of printed literature.[124]

C. Who can obtain the consent?

Another issue targeted by the court was a physician's direct involvement in the acquisition of consent. Although earlier cases briefly mentioned non-physician medical personnel obtaining patient consents,[125] *Barner* was the first case to discuss the issue in depth. The court stressed that it was highly preferable for the physician himself to obtain the consent whenever possible, especially where an ongoing physician-patient relationship existed.[126] The court went even further and stated that consent obtained from a Licensed Practical Nurse may not be sufficient.[127] This suggestion by the court may begin a trend in Mississippi decisions that could culminate in requiring that physicians always personally obtain the informed consent of their patients.

Barner further developed the doctrine of informed consent in favor of the patient. Specifically, the court seriously weakened the evidentiary weight of consent forms by requiring "documentary evidence" beyond ordinary general consent forms to rebut a claim of informed consent.[128] Furthermore, the court suggested that physicians need to inform the patient and personally acquire their consent, rather than delegating that duty to other medical personnel such as nurses. As a result, plaintiffs will likely have an easier task at proving a claim of failure to obtain informed consent.

---

[124] *Barner*, 605 So. 2d at 808.

[125] *See, e.g., Phillips*, 516 So. 2d at 493-94 (noting plaintiff's contention that consent should have been obtained by doctor, not nurse); Trapp v. Cayson, 471 So. 2d 375, 384 (Miss. 1985) (failing to find hospital liable when nurses improperly obtained consent from patient).

[126] *Barner*, 605 So. 2d at 808.

[127] *Id.* Although the court only mentioned that consent obtained by a practical nurse may be insufficient, it would seem that the distinction to be drawn is between licensed physicians and other medical personnel, as opposed to between practical nurses and other non-physician medical personnel, such as registered nurses and paramedics.

[128] *Id.*

V. CONCLUSION

In the past two decades, the Mississippi Supreme Court has established and developed the doctrine of informed consent and many of its elements. However, the court has been miserly on opinions concerning specific areas of informed consent law. There remain many questions to be answered for the consent plaintiff and the medical defendant.

For example, what currently constitutes required documentary or verbal evidence for informed consent cases? With the *Barner* decision, this evidentiary requirement took on new meaning. Obviously, the court does not feel that consent forms standing alone will suffice. However, beyond recommending printed brochures and extensive discussion,[129] the court failed to indicate the nature of the "limitless" written or verbal evidence that would be sufficient. Would doctor's notes of the patient's consent suffice? Would patient chart records or lengthy informative documents signed by the patient suffice? Testimony of other medical personnel who observed consent being given? The *Barner* court was silent. What specifically constitutes sufficient documentary evidence, although crucial to informed consent litigants, remains unclear after the *Barner* decision.

Another important issue fueled by the recent *Barner* decision is that of who may obtain a patient's consent. The court in *Barner* stated that consent obtained from a licensed practical nurse "may" not be sufficient and that physicians

---

[129] *Id.* at 808. While these measures would be informative to the patient, their existence would not likely solve the evidentiary problems of physicians in proving that informed consent was obtained. For example, a patient could deny he ever saw a brochure as easily as he could deny what he was told. The physician would still have to produce "verbal or documentary evidence" to support the assertions of what the patient was told through brochures or discussions.

"should" obtain the consent personally whenever possible.[130] Was the court suggesting that in the future doctors may have to personally obtain consent from every patient they treat? How is a physician to know whether and when consent acquired by a registered nurse, a paramedic or any other non-physician medical personnel will be sufficient? Certainly, patients and doctors alike desire to have these questions answered, for a failure to understand what the court wishes could easily result in new liability for the physician, or false hopes of recovery for the injured plaintiff.

On the other hand, the answer to these questions may not be so simple. Perhaps the Mississippi Supreme Court has merely recognized the delicate balance between an individual's right to be free from unwarranted intrusion[131] and the practical concerns of the medical profession in treating patients,[132] and is presently unwilling to endorse one of these concerns to the detriment of the other. Requiring physicians to personally acquire consent of their patients in every case may be impossible for the practitioner without decreasing the number of patients he is capable of serving. However, if failing to properly obtain consent to treatment means he will not adequately serve his patients, then perhaps it is best that he properly serve a smaller number instead of improperly serving a larger number. Consequently, the court may have intentionally refrained from adopting strict standards in favor of analyzing each such case on its individual merits, so as not to drastically tip the scale in either direction.

Walter Alan Davis
John Graham Holaday

---

[130] *Id.*

[131] *See* Young v. Jackson, 572 So. 2d 378, 381 (Miss. 1990). "The positive law of this state affords each person a substantial zone of freedom which, at his election, he may keep private. The zone surrounds person and place and without his consent may not be invaded by other persons . . . ." *Id.*

[132] *See Ross*, 234 So. 2d at 909-10. "It must also be borne in mind that a surgeon's primary concern at the time of consultation about surgery is and should be the best possible treatment of his patient's illness, not preparation for the defense of a possible lawsuit." *Id.*

TORT REFORM AND THE MISSISSIPPI CONSTITUTION OF 1890

I. INTRODUCTION

For nearly a decade the Mississippi Legislature has considered numerous legislative remedies to reform the tort system. These measures, including statutory limits on the amount of non-economic and punitive damages, abolition of the collateral source rule, periodic payment of damages, litigation review panels and restrictions on attorney's fees, were all loosely tied to the size and frequency of damage awards. The two most popular reform measures, mandatory limits on the amount and application of non-economic and punitive damages and abolition of the collateral source rule, have received substantial consideration for at least nine consecutive legislative sessions.[1] Also, various tort reform measures aimed at products liability and medical malpractice actions have received consideration by Congress.[2]

---

[1] S. 2624, 109th Leg., Reg. Sess. § 1 (1994) (proposing Mississippi Health Policy Act of 1994); H.R. 1439, 109th Leg., Reg. Sess., §§ 18, 19 (1994) (proposing $250,000 limit on non-economic damages in medical malpractice actions and elimination of collateral source rule); H.R. 738, 109th Leg., Reg. Sess. § 1 (1994) (proposing Product Liability Punitive Damages Payment Act of 1994); H.R. 737, 109th Leg., Reg. Sess. § 1 (1994) (proposing Medical Malpractice Punitive Damages Payment Act of 1994); S. 2454, 108th Leg., Reg. Sess. § 1 (1993) (proposing Mississippi Punitive Damages Act); S. 2453, 108th Leg., Reg. Sess. (1993) (proposing guidelines for imposition of punitive damages); S. 2297, 108th Leg., Reg. Sess. (1993) (proposing criteria for award of punitive damages); H.R. 1447, 108th Leg., Reg. Sess. § 1 (1993) (proposing Mississippi Punitive Damages Act); H.R. 849, 108th Leg., Reg. Sess. § 1 (1993) (proposing guidelines applicable to punitive damages); H.R. 431, 108th Leg. (1993) (proposing Product Liability Punitive Damages Payment Act of 1993); H.R. 430, 108th Leg., Reg. Sess. § 1 (1993) (proposing Medical Malpractice Punitive Damages Payment Act of 1993); S. 2846, 107th Leg., Reg. Sess. (1992) (proposing guidelines for imposition of punitive damages); S. 2837, 107th Leg., Reg. Sess. (1992) (proposing mandatory criteria for imposition of punitive damages); H.R. 1150, 107th Leg., Reg. Sess. § 1 (1992) (proposing guidelines for imposition of punitive damages); H.R. 992, 107th Leg., Reg. Sess. (1992) (proposing any punitive damage award be payable to state general fund); H.R. 991, 107th Leg., Reg. Sess. § 4 (1992) (proposing that an award of punitive damages in medical malpractice actions be payable to state general fund); S. 2717, 106th Leg., Reg. Sess. § 1(1) (1991) (proposing $200,000 limit in indigent medical malpractice actions); H.R. 834, 106th Leg., Reg. Sess. § 1(1) (1991) (proposing $200,000

These and other tort reform measures constituted the Legislature's response to the perceived "crisis" in insurance rates and tort litigation that swept state legislatures in the late 1970's and 1980's.[3] A sharp increase in insurance and litiga-

---

limit in indigent medical malpractice actions); H.R. 403, 106th Leg., Reg. Sess. § 2(2) (1991) (proposing bifurcated trial for punitive damages); S. 2592, 105th Leg., Reg. Sess. § 2 (1990) (proposing regulation of punitive damages in products liability actions); H.R. 939, 105th Leg., Reg. Sess. (1990) (proposing regulation of punitive damages in punitive damages actions); S. 2259, 104th Leg., Reg., Sess. § 1 (1989) (proposing Collateral Source Deduction Act of 1989); H.R. 625, 104th Leg., Reg. Sess. § 1 (1989) (proposing Punitive Damage Limitation Act of 1989); H.R. 425, 104th Leg., Reg. Sess. (1989) (proposing Collateral Source Deduction Act of 1989); H.R. 1260, 103rd Leg. (1988) (proposing Collateral Source Deduction Act of 1988); H.R. 768, 103rd Leg., Reg. Sess.§ 1 (1988) (proposing Punitive Damages Limitation Act of 1988); H.R. 767, 103rd Leg., Reg. Sess. § 1 (1988) (proposing Non-economic Damage Limitation Act of 1988); S. 2755, 102nd Leg., Reg. Sess. § 2 (1987) (proposing maximum limit on punitive damage awards); S. 2688, 102nd Leg., Reg. Sess. 1 (1987) (proposing Mississippi Tort Reform Act of 1987); H.R. 972, 102nd Leg., Reg. Sess. § 2 (1987) (proposing new guidelines for imposition of punitive damage awards); H.R. 970, 102nd Leg., Reg. Sess. § 1 (1987) (proposing Mississippi Tort Reform Act of 1987); H.R. 895, 102nd Leg., Reg. Sess. § 2 (1987) (proposing maximum limit on punitive damage award); H.R. 908, 102nd Leg., Reg. Sess. § 2 (1987) (proposing maximum limit on non-economic damage awards); H.R. 904, 102nd Leg., Reg. Sess. § 1 (1987) (proposing Mississippi Tort Reform Act of 1987); H.R. 903, 102nd Leg., Reg. Sess. § 1 (1987) (proposing Mississippi Tort Reform Act of 1987); H.R. 826, 102nd Leg., Reg. Sess. § 1 (1987) (proposing Mississippi Tort Reform Act of 1987); H.R. 706, 102nd Leg., Reg. Sess. § 1 (1987) (proposing Mississippi Tort and Insurance Reform Act); H.R. 256, 102nd Leg., Reg. Sess. § 1 (1987) (proposing Mississippi Tort Reform Act of 1987); H.R. 8, 102nd Leg., Reg. Sess. § 1 (1987) (proposing separate complaint after resolution of underlying cause of action when pleading punitive damages); S. 2376, 101st Leg., Reg. Sess. (1986) (proposing guidelines for imposition of punitive damages).

[2] S. 640, 102d Cong., 1st Sess. (1991) (proposing Product Liability Fairness Act); S. 1400, 101st Cong., 2d Sess. (1990) (proposing Product Liability Reform Act); H.R. 1115, 100th Cong., 2d Sess. (1988) (proposing federal product liability reform); *see also* Slade Gorton, *Introduction to Gonzaga Law Review Issue on Tort Reform*, 27 GONZ. L. REV. 147, 149-51 (1992) (explaining effect of Senate Bill 640 in 102d Congress).

[3] George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1521 (1987). The breadth of commentary on tort reform and the insurance crisis is plentiful. *See* Sean F. Mooney, *The Liability Crisis - A Perspective,* 32 VILL. L. REV. 1235, 1235-46 (1987) (analyzing dimensions, factors and growth of liability insurance crisis); Martin H. Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 760 (1977) (asserting insurance crisis affected entire health system); *see also* Robert A. Prentice & Mark E.

tion costs caused those adversely affected by this crisis to demand legislative relief. Thus, the pace of recent national legislative activity on tort reform has been phenomenal.[4] Forty-eight states adopted tort reform legislation between 1985 and 1988.[5] Forty-one states adopted some type of legislative tort reform in 1986 alone.[6] Additionally, at least twenty-three states adopted statutory limits on the amount of non-economic

---

Roszkowski, *"Tort Reform" and the Liability "Revolution": Defending Strict Liability in Tort for Defective Products*, 27 GONZ. L. REV. 251, 255-72 (criticizing litigation explosion and insurance crisis in tort actions); G. Edward White, *Tort Reform in the Twentieth Century: An Historical Perspective*, 32 VILL. L. REV. 1265, 1265 (1987) (asserting tort reform was ongoing process throughout twentieth century).

[4] Richard C. Turkington, *Constitutional Limitations on Tort Reform: Have the State Courts Placed Insurmountable Obstacles in the Path of Legislative Responses to the Perceived Liability Insurance Crisis?*, 32 VILL. L. REV. 1299, 1301 (1987). Turkington notes that a majority of states have adopted or proposed caps on damages, alteration of the collateral source rule and regulation of attorney fees. *Id.*

[5] Joseph Sanders & Craig Joyce, *"Off to the Races": The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 218-23 (1990). This study examined twelve different tort reform measures. *Id.* at 220-22. Apparently, Pennsylvania and Vermont were the only states that did not enact tort reform legislation between 1985 and 1988. *Id.* at 210 n.13.

[6] Philip A. Talmadge & N. Clifford Petersen, *In Search of a Proper Balance*, 22 GONZ. L. REV. 259, 259 (1986). Also in 1986, there were at least 1,400 bills introduced into state legislatures intended to alleviate the insurance crisis and reform the tort system. *Id.*

[7] ALA. CODE § 6-5-544 (1993) (imposing $400,000 limit on non-economic damages); ALASKA STAT. § 09.17.010 (Supp. 1993) (limiting award for loss due to non-economic damages to $500,000); CAL. CIV. CODE § 3333.2(b) (West Supp. 1994) (limiting non-economic damages in medical malpractice actions to $250,000); COLO REV. STAT. § 13-21-102.5(3) (1987) (imposing $250,000 limit on non-economic damages in civil actions) (repealed Supp. 1993); FLA. STAT. ANN. § 768.80 (repealed West Supp. 1992); HAW. REV. STATE. § 663-8.7 (repealed Supp. 1993); IDAHO CODE § 6-1603 (1990) (imposing $400,000 limit on non-economic damages); KAN. STAT. ANN. §60-3407(1) (Supp. 1993) (imposing $250,000 non-economic damage limitation in medical malpractice actions arising before July 1, 1988); LA. REV. STAT. ANN. § 40.1299.42 (West Supp. 1992) (limiting damages in medical malpractice actions to $500,000); MD. CODE ANN., CTS. & JUD. PROC. § 11-108(b) (1989) (imposing $350,000 limit on non-economic damages in personal injury actions); MINN. STAT. ANN. § 548.18 (repealed 1987); MO. ANN. STAT. § 538.210 (Vernon 1988) (limiting non-economic damages to $350,000); N.H. REV. STAT. ANN. § 507-C:7 (1983) (imposing $250,000 limit on non-economic damages); N.D. CENT. CODE § 32.03.2-08 (Supp. 1993) (requiring judicial review of punitive damages exceeding $250,000); OHIO REV. CODE ANN. § 2307.43 (Anderson 1991) (imposing $200,000 limit on medical malpractice actions); TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (West Supp. 1994)

and punitive damages[7] and twenty states adopted legislation abolishing or modifying the collateral source rule.[8]

The debate over tort reform in the last decade has emphasized the "remedial" aspect of the law, focusing primarily on restricting the size of damage awards.[9] Consequently, the nucleus of these reforms have concentrated on the economic and political aspects of tort law.[10] While these are important considerations, little attention has been given to well settled rules of tort and constitutional law.[11] For nearly a decade, reformers have continued to advocate damage caps and abdication of the collateral source rule while remaining seemingly oblivious to the legal and constitutional ramifications of such measures. Each legislative session these two popular

---

(limiting punitive damages to $200,000); UTAH CODE ANN. § 78-14-7.1 (1992) (limiting non-economic damages to $250,000); VA. CODE ANN. § 8.01-581.15 (Michie 1992) (limiting damage against health care provider to $1,000,000); WASH. REV. CODE ANN. § 4.56.250 (West 1988) (limiting non-economic damages to formula of multiplying 0.43% of average annual wage by life expectancy); W. VA. CODE § 55-73-8 (Supp. 1993) (limiting damages to $1,000,000); WIS. STAT. § 893.55 (Supp. 1993) (limiting non-economic damages to $1,000,000).

[8] *See infra* notes 100, 101 and accompanying text.

[9] Robert L. Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13, 39 (1988). The focal point of tort critics and state legislatures in the past has been limits on the amount of pain and suffering and punitive damages, as well as elimination of joint and several liability and the collateral source rule. *Id.* Rabin noted that the more attractive reforms have been caps on awards, a bar on joint and several liability and elimination of the collateral source rule. *Id.* at 39-40.

[10] Sanders & Joyce, *supra* note 5, at 262. Most tort reform measures attempted to control the tort system by manipulating monetary incentives to litigation. Sanders & Joyce, *supra* note 5, at 262. The debate over tort reform, especially punitive damage reform, in the 1980's became "politicilization" by well-organized and well-financed interest groups. Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 9-10 (1990). Thus, the political transformation of the tort reform debate makes the debate more emotional and less reasoned. *Id.* at 12.

[11] Sanders & Joyce, *supra* note 5, at 262. Apparently the majority of tort reforms have not even marginally addressed substantive rules of tort law. Sanders & Joyce, *supra* note 5, at 262. Additionally, the debate over tort reform, especially punitive damages, has become a matter of public relations, propaganda, prejudice and fear, rather than a matter of rational discourse. Daniels and Martin, *supra* note 10, at 13. This issue remains misunderstood by both the public and policy-makers. Talmadge & Petersen, *supra* note 6, at 259. The debate is based largely on perception, appearance, and anecdotes rather than fact, analysis and documentation. Talmadge & Petersen, *supra* note 6, at 259.

measures continue to receive increasing consideration and support.[12] Furthermore, the Legislature has shown a propensity to adopt similar damage limitations in other types of actions. For instance, the Sovereign Immunity Act, which was adopted by the Legislature in the last regular session, placed a mandatory $50,000 cap on all damages in actions against a governmental entity for the next three years.[13]

This comment will attempt to sidestep the political rhetoric and economic effects which surrounds various tort reform measures. Instead, emphasis will be placed on substantive rules of tort and constitutional law as they are applied in Mississippi jurisprudence. This comment will demonstrate the legislative error of ignoring substantive constitutional rights when attempting to reform the tort system by statute. Specifically, this comment will address the issues surrounding the constitutional implications of a non-economic and punitive damage limitation and elimination of the collateral source rule according to Mississippi's Constitution of 1890. Part II of this Comment will provide an executive summary of the tort reform legislation proposed and rejected in the Mississippi Legislature during the past decade, with emphasis on damage caps and abdication of the collateral source doctrine. Part III will address the constitutionality of the proposed cap on non-economic and punitive damages according to the right to a trial by jury, right to access to courts and remedies, separation of powers and prohibition against special legislation provisions of the Mississippi Constitution of 1890. Finally, Part IV will discuss the constitutionality of the proposed abdication or alteration of the collateral source rule according to the right to due process, right to trial by jury and separation of powers doctrines of the state constitution.

---

[12] While these measures have not been formally adopted, an excellent indicator of support for this type of legislation is the number of sponsors each bill contained. For instance, House Bill 849, introduced in the 108th Session, contained fourteen sponsors while the Punitive Damage Limitation Act of 1989 had twelve sponsors and House Bill 768, the Punitive Damage Limitation Act of 1988, contained twenty sponsors. *See supra* note 1 and accompanying text.

[13] MISS. CODE ANN. § 11-46-15 (Supp. 1993). This Act created a system where damages were increased incrementally every four years. *Id.* For instance, any claims against a governmental entity arising on or after July 1, 1993, but before July 1, 1997 may not exceed $50,000. MISS. CODE ANN. § 11-46-15(1)(a) (Supp. 1993). For claims arising on or after July 1, 1997, but before July 1, 2001, the maximum damages may not exceed $250,000. MISS. CODE ANN. § 11-46-15(1)(b) (Supp. 1993). For any claims arising after July 1, 2001, the damages may not exceed $500,000. MISS. CODE ANN. § 11-46-15(1)(c) (Supp. 1993). Also, this section prohibits punitive damages against a governmental entity. MISS. CODE ANN. § 11-46-15(2) (Supp. 1993). Finally, this section mandates that if the jury awards a verdict that exceeds the liability limit, the trial court must reduce the verdict to the amount set by statute. MISS. CODE ANN. § 11-46-15(3) (Supp. 1993).

II. EXECUTIVE SUMMARY OF PROPOSED LEGISLATION

Most of the tort reform measures introduced in the Mississippi Legislature over the past ten years focused on limiting the frequency and amount of judgments.[14] For instance, the Non-economic Damage Limitation Act of 1989 proposed a maximum limit of $250,000 for all non-economic damages in all personal injury actions.[15] Similarly, the Tort Reform Act of 1987 purported to limit the amount of punitive damages to twice the amount of compensatory damages[16] and to completely prohibit punitive damages in certain types of products liability actions.[17] Numerous proposals would require depositing all or a percent of a punitive damage award into the state general fund,[18] while other measures, like the Mississippi

---

[14] *See supra* note 1 and accompanying text.

[15] H.R. 426, 103rd Leg., Reg. Sess. § 21(2)(B) (1989); *see also* H.R. 787, 102nd Leg., Reg. Sess. § 3 (1988) (proposing $250,000 cap on all non-economic damages); H.R. 706, 102nd Leg., Reg. Sess. § 4 (1987) (proposing $250,000 limit on all non-economic damages).

[16] H.R. 256, 102nd Leg., Reg. Sess. § 6 (1987).

[17] *Id.* Additionally, this act would deem collateral sources of compensation as admissible evidence. *Id.* at § 9.

[18] H.R. 430, 108th Leg., Reg. Sess. § 4 (1993). This bill proposed that any award of punitive damages in a medical malpractice action should be deposited in the state general fund. *Id.*; *see* H.R. 431, 108th Leg., Reg. Sess. § 4 (1993) (proposing award of punitive damages in civil action be deposited in state general fund). Other measures proposed depositing all punitive damage awards in the Education Enhancement Fund. H.R. 1447, 108th Leg., Reg. Sess. § 7 (1993). At least one jurisdiction has enacted a similar measure. *See generally*, FLA. CODE ANN. § 768.73(2)(b) (West Supp. 1993) (providing thirty-five percent of punitive damage award in personal injury or wrongful death action payable to Public Medical Assistance Trust Fund or General Revenue

Punitive Damages Act, proposed new guidelines for awarding punitive damages.[19] One measure even proposed a maximum limit on the hourly fee a defense attorney may charge a client, commencing with a $50 maximum fee for the first ten hours of service, then lowering the maximum fee to $35 for the next forty hours, $30 for the next sixty hours and finally a $10 maximum fee for the next 100 hours.[20]

As noted above, the two most popular tort reform proposals in Mississippi over the last ten years were attempts to impose limits on liability in the form of a cap on non-economic and punitive damages and abolition of the collateral source rule.[21] These measures seem to be gathering support. For example, there were seven bills introduced in the 108th Legislative Session to limit damages, particular punitive damages, compared to five in the 107th Session and one in the 105th.[22] Thus, these popular proposals will be examined further.

III. CONSTITUTIONALITY OF A STATUTORY DAMAGE LIMITATION

As noted earlier, the debate over tort reform in the mold of damage limitations has focused primarily on the law's remedial side.[23] The size and frequency of damage awards continues to be a prime concern for insurers and trade associations. This section will bypass the political and economic rhetoric surrounding tort reform and directly address the constitutionality of non-economic and punitive damage caps in Mississippi. Various

---

Fund).

[19] *See* H.R. 849, 108th Leg., Reg. Sess. § 3 (1993) (proposing judge shall decide amount of punitive damages in bifurcated trial); H.R. 849, 108th Leg., Reg. Sess. § 1 (1993) (proposing financial condition of defendant inadmissible when considering amount of punitive damages); H.R. 939, 105th Leg., Reg. Sess. § 2 (1990) (proposing new guidelines for product liability actions and punitive damage awards); H.R. 426, 104th Leg., Reg. Sess. § 4 (1989) (proposing elimination of punitive damages for breach of contract).

[20] H.R. 706, 102nd Leg., Reg. Sess. § 7 (1987). This measure would also forbid a defense attorney from billing over 400 hours to any one client for a single case. *Id.*

[21] *See supra* note 1 and accompanying text.

[22] *See supra* note 1 and accompanying text.

[23] *See supra* notes 4-6 and accompanying text.

trade associations in advocating tort reform have noted that many reform proposals lack a strong constitutional foundation.[24] Given the arbitrary and inconsistent manner in which these reforms were introduced and adopted, it is not surprising that members of the Bar have begun to challenge these reforms and defend the tort system.[25] In their haste to adopt nearly any proposal labeled as tort reform, many reformers failed to consider the legal or constitutional implications of such an action. Subsequently, numerous jurisdictions have declared recently adopted damage caps unconstitutional when applied to various provisions of their state constitutions.[26] These constitutional provisions include the right to a trial by jury,[27] open access to courts and remedies,[28] prohibition of special legislation,[29] separation of powers clauses and equal protection guarantees.[30] This section will test the constitutionality of legislative non-economic and punitive damage caps against the right to trial by jury,[31] right to court access and legal remedies,[32] separation of powers[33] and prohibition of special legislation clauses[34] contained in the Mississippi Constitution of 1890.[35]

---

[24] The American Medical Association impaneled a special task force on medical liability which filed three detailed reports on medical liability tort reform. AMERICAN MEDICAL ASS'N., SPECIAL TASK FORCE ON PROF. LIAB. & INS., PROF. LIAB. IN THE '80S, REPORTS 1, 2, 3 (1984-86). The second report noted that constitutionality created the single greatest weakness of nearly all reform measures. AMERICAN MEDICAL ASSN., SPECIAL TASK FORCE ON PROF. LIAB. & INS., PROF. LIAB. IN THE '80S, REPORT 2, at 18-19 (Nov. 1984).

[25] David R. Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 OKLA L. REV. 195, 199 (1985). The American Bar Association filed a report generally defending the tort system and offered several recommendations for improving the tort system. American Bar Assoc., REPORT OF THE AMERICAN BAR ASSOCIATION ACTION COMM'N TO IMPROVE THE TORT LIABILITY SYSTEM 8-45 (1987). Moreover, the ABA report did not recommend a cap on non-economic or punitive damages. *Id.* at 18-19. *See generally* Robert B. McKay, *Rethinking the Tort Liability System: A Report from the ABA Action Commission*, 32 VILL. L. REV. 1219, 1223-33 (1987) (examining ABA Action Commission's recommendations); Ralph Nader, *The Corporate Drive to Restrict Victims' Rights*, 22 GONZ. L. REV. 15, 18 (1987) (arguing tort reform was unprincipled public relations scam).

[26] Smith, *supra* note 25, at 212-13. Furthermore, judicial interpretation of state constitutional rights have recently experienced a revolution. Robert F. Williams, *State Constitutional Law Processes,* 24 WM. & MARY L. REV. 169, 171 (1983). There is a general "rediscovery" of state bill of rights. *Id.* at 185. Also, state supreme courts have increasingly acted independent of the Supreme Court when interpreting their own constitutions and statutes. *Id.* For instance, the Alaska Supreme Court determined it was under a "duty" to develop additional constitutional rights and privileges under the Alaska Constitution without Supreme Court direction. Baker v. Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970). Finally, Justice Stevens has articulated that the Supreme Court should not grant certiorari to review a state supreme court's decision when the state court interprets certain constitutional rights. Michigan v. Long, 463 U.S. 1032, 1065-72 (1983) (Stevens, J., dissenting).

[27] *See* Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 164 (Ala. 1991) (holding $400,000 cap on non-economic damages violated right to trial by jury); Jeanne v.

Hawkes Hosp., 598 N.E.2d 1174, 1180 (Ohio 1991) (holding $200,000 cap on general damages violated right to trial by jury); Sofie v. Fibreboard Corp., 771 P.2d 711, 728 (Wash. 1989) (en banc) (holding formula limiting non-economic damages to 0.43% of injured party's annual income and life expectancy violated right to trial by jury).

[28] *See* Lucas v. United States, 757 S.W.2d 687, 692 (Tex. 1988) (holding $500,000 cap on medical malpractice damages violated right to court access clause of state constitution).

[29] *See* Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736, 743 (Ill. 1976) (holding statutory cap on damages against health care providers violated prohibition of special legislation provision of state constitution).

[30] *See* Brannigan v. Usitalo, 587 A.2d 1232, 1236 (N.H. 1991) (holding $875,000 limit on non-economic damages in personal injury actions violated state equal protection guarantee); White v. State, 661 P.2d 1272, 1274-75 (Mont. 1983) (holding right to bring civil actions was fundamental right and statutory caps on damages against state, county or municipality violated equal protection clauses of federal and state constitutions); Carson v. Maurer, 424 A.2d 825, 838 (N.H. 1980) (holding $250,000 cap on non-economic damages in medical malpractice actions violated state equal protection guarantees). *But see* Butler v. Flint Goodrich Hosp., 607 So. 2d 517, 521 (La. 1992) (holding $500,000 cap on certain medical malpractice actions did not violate equal protection guarantee), *cert. denied*, 113 S. Ct. 2338 (1993); Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 904-05 (Mo. 1992) (holding $350,000 cap on non-economic damages did not violate equal protection guarantee), *cert. denied* 113 S. Ct. 511 (1992). *See generally* Annesley H. DeGaris, Note, *The Constitutionality of Statutory Damage Limitations in Medical Malpractice Actions* - Duren v. Suburban Community Hosp., 17 CUMB. L. REV. 569, 572-82 (1987) (analyzing development of equal protection challenges to damage caps).

[31] This comment will only address state constitutional challenges to tort reform. The federal courts have generally upheld tort reform measures limiting liability. *See* Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1331 (D. Md. 1989).

[32] MISS. CONST. art. III, § 31.

[33] MISS. CONST. art. III, § 24.

[34] MISS. CONST. art. I, §§ 1, 2.

[35] MISS. CONST. art. IV, § 87.

A. *Right to Trial by Jury*

Article III, section thirty-one of the Mississippi Constitution of 1890 provides: "The right of trial by jury shall remain inviolate, but the Legislature may, by enactment, provide that in all civil suits tried in the circuit and chancery court, nine or more jurors may agree on the verdict and return it as the verdict of the jury."[36]

This section attempted to preserve the liberties of the people and secure fairness, justice and understanding.[37] The fact that the Seventh Amendment of the United States Constitution does not apply to the states makes section thirty-one vitally important to the just application of the law on the state level.[38] Of course, if one had a right to a jury trial at common law then section thirty-one preserved this right.[39] Finally, it is the duty of the court to impanel a competent, fair and impartial jury.[40]

The Mississippi Supreme Court has steadfastly affirmed the paramount importance of section thirty-one in actions for civil damages.[41] For example, the court has routinely held the propriety and amount of punitive damages is solely a matter within the jury's discretion.[42] Furthermore, a jury's determination of punitive damages is rarely disturbed on review.[43] While no legislation has yet called for the complete elimination of a jury's role in assessing non-economic and punitive damages, the imposition of a mandatory cap on non-economic and punitive damages violates the right to trial by jury by removing from the jury's consideration damages in excess of the statutory limit. This argument is particularly credible when augmented with the right of access to courts and remedies provision of the Mississippi Constitution of 1890.[44]

---

[36] MISS. CONST. art. III, § 31.

[37] GEORGE H. ETHERIDGE, MISSISSIPPI CONSTITUTIONS 151 (1948).

[38] U.S. CONST. amend. VII. In *Minneapolis & St. L.R.R. v. Bombolis*, the court held that the seventh amendment applied only to proceedings in courts of the United States. Minneapolis & St. L. R.R. v. Bombolis, 241 U.S. 211, 217 (1916). It is well settled that the seventh amendment does not regulate trials by jury in state courts. *Id.*

[39] ETHERIDGE, *supra* note 37, at 150.

[40] Hudson v. Taleff, 546 So. 2d 359, 363 (Miss. 1989).

[41] The court has determined that a trial by jury has universally meant a jury of twelve qualified persons who decide the facts in a case under the supervision of the trial judge. Dement v. Summer, 165 So. 791, 793 (Miss. 1936). Additionally, a circuit court committed reversible error when it transferred a case seeking punitive damages to chancery court, thereby denying plaintiff's substantive right to litigate for punitive damages. Thompson v. First Miss. Nat'l Bank, 427 So. 2d 973, 976 (Miss. 1983).

[42] Yazoo & Miss. Valley R.R. v. Williams, 39 So. 489, 491 (Miss. 1905).

[43] Andrew Jackson Life Ins. Co. v. Williams, 566 So. 2d 1172, 1190 (Miss. 1990).

Other jurisdictions have tested the constitutional validity of limits on non-economic and punitive damages and held these statutorily imposed caps violate the substantive right to trial by jury. For instance, in *Moore v. Mobile Infirmary Ass'n*,[45] the Alabama Supreme Court held that a statutory limit of $400,000 on non-economic damages imposed an impermissible burden to the right to a trial by jury.[46] In *Moore*, the court examined the operational effect of the statute and held such ceilings would summarily disregard a jury's assessment of damages in excess of the predetermined cap.[47] Additionally, the court found a predetermined ceiling would not allow for consideration of the exigencies of an individual case and impaired the function of the jury.[48] Likewise, in *Henderson by and through Hartsfield*

---

[44] *See infra* notes 55, 69-75 and accompanying text.

[45] 592 So. 2d 156 (Ala. 1991). It should be noted that decisions of other jurisdictions, if well reasoned and supported, may be persuasive authority upon Mississippi courts. Griffith v. Gulf Ref. Co., 61 So. 2d 306, 307 (1952). Of course, a court is not bound by these decisions, but the opinions may receive respectful consideration if they promote justice. *Id.*; *see also* New York Life Ins. Co. v. Ware, 157 So. 894, 895 (1934) (holding decisions from foreign courts may be of general authority but are not precedent).

[46] *Moore*, 592 So. 2d at 164. The Alabama Constitution guarantees that an individual's right to trial by jury shall remain inviolate. ALA. CONST. art. 1, § 11. In 1987, the Alabama Legislature adopted two sweeping tort reform measures. Leonard J. Nelson, *Tort Reform in Alabama: Are Damages Restrictions Unconstitutional?*, 40 ALA L. REV. 533, 533 (1989). The Alabama Medical Liability Act of 1987, dealt with in *Moore*, imposed a $400,000 limit on non-economic damages in medical malpractice actions. *Id.* at 550. The Alabama Tort Reform Act imposed a cap of $250,000 on punitive damages. *Id.*

[47] *Moore*, 592 So. 2d at 163. The court noted there was a substantial body of case law concerning constitutional challenges to damage caps. *Id.* at 158. The majority of these challenges have invalidated statutory damage limitations. *Id.*

[48] *Id.* at 163. The court stated it was irrelevant that the statute only partially abrogated the right to a jury trial. *Id.* The court felt the true issue was whether the

v. Alabama Power Co.[49] the Alabama Supreme Court held a $250,000 limit on punitive damages violated a litigant's right to a trial by jury.[50] In *Henderson*, the court held that the imposition of a punitive damage limitation clearly impaired the traditional function of the jury.[51] Finally, the Washington Supreme Court in *Sofie v. Fibreboard Corp.*[52] determined that a statutory cap on damages violated the right to a trial by jury granted by that state's constitution.[53] In comparison, the non-economic and punitive damages limitations proposed by the Mississippi Legislature were textually similar to the statutory caps struck down in *Moore, Henderson* and *Sofie* and would patently offend a litigant's right to a trial by jury.[54]

---

right to a jury trial existed at the time the constitution was adopted. *Id.* at 163-64. The court noted the right to a jury trial must not diminish over time. *Id.* (citing Sofie v. Fibreboard Corp., 771 P.2d 711, 722 (1989)).

[49] 627 So. 2d 878 (Ala. 1993).

[50] *Henderson*, 627 So. 2d at 893-94. An Alabama statute limited the maximum amount of punitive damages to $250,000. ALA. CODE § 6-11-21 (Supp. 1993). The plaintiff, a minor, suffered injuries when he climbed upon the defendant's electrical service tower. *Id.* at 880. The jury found the defendant negligent under the theory of attractive nuisance and awarded $15,303.84 in compensatory damages and $500,000 in punitive damages. *Id.* The trial court remitted the punitive damage award to $250,000 pursuant to Alabama law. *Id.*

[51] *Henderson*, 627 So. 2d at 893. The court articulated that the jury served as an institution of the body politic and was the conscience of the community. *Id.* Punitive damages are limited and not granted as a matter of right. *Id.* at 886. The court determined that the Legislature cannot prohibit juries from awarding punitive damages in an amount commensurate to the wrongdoing shown by the evidence. *Id.* at 887.

[52] 771 P.2d 711 (Wash. 1989).

[53] *Sofie*, 771 P.2d at 728. The court found it highly persuasive that four other states also held damage limitations unconstitutional according to similar right to jury provisions. *Id.* at 723. Finally, the court held the jury's determination of damages to be both reasonable and supported by the evidence. *Id.* at 728.

[54] *Moore*, 592 So. 2d at 164; *Henderson*, 627 So. 2d at 893-94; Sofie, 771 P.2d at 728. *Contra* Etheridge v. Medical Ctr. Hosp., 376 S.E.2d 525, 529 (1989) (holding $750,000 cap on non-economic damages failed to violate constitutional right of jury trial because remedies are matter of law not fact); Johnson v. St. Vincent Hosp. Inc., 404 N.E.2d 585, 602 (Ind. 1980) (upholding $500,000 limit on all damages against right to trial by jury challenge). *See generally* Fein v. Permanente Medical Group, 695 P.2d 665, 686 (Cal. 1980) (upholding $250,000 limit on non-economic compensatory damages against various state constitutional challenges), *appeal dismissed*, 474 U.S. 892 (1985).

B. Right to Court Access and Remedies Clause

Article III, section twenty-four of the Mississippi Constitution of 1890 provides that "[a]ll courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and right and justice shall be administered without sale, denial, or delay."[55]

This section, while noticeably absent from the Federal Constitution, has been described as "[t]he great guarantee of Law and Justice."[56] It has its origins in chapter twenty-nine of the Magna Carta.[57] Similar provisions were found in each of Mississippi's four constitutions and in the constitutions of twenty-eight other states.[58] Nevertheless, the Mississippi Supreme Court has traditionally failed to recognize this critically significant section.

In *Miles v. Board of Supervisors*,[59] the court determined that the historical interpretation of section twenty-four and the principles of due process required the courts to afford both equal access and a fair hearing to all.[60] However, more recently, the court has given substantial discretion to the Legislature to impose statutory limits on the right to access to courts and damages. For instance, in *Walters v. Blackledge*[61] the court explained that the Legislature had full power to change or abolish existing common law remedies and methods of procedure.[62] Additionally, in *Grimes v. Pearl River Valley Water Supply District*,[63] where the constitutionality of Mississippi's sovereign immunity statute was challenged, the Fifth Circuit Court of Appeals found that section twenty-four did not place a limitation on the Legislature's ability to enact legislation.[64]

---

[55] MISS. CONST. art. III, § 24.

[56] ETHERIDGE, *supra* note 37, at 123 (1948). Justice Etheridge notes that the open courts provision was intended to forestall the abuses of the English King and his Star Chamber. ETHERIDGE, *supra* note 37, at 125-26. Also, for every wrong held actionable at common law, this section was meant to provide a remedy which the Legislature cannot take away without providing a reasonable alternative. ETHERIDGE, *supra* note 37, at 123.

[57] Luther T. Munford & E. Marcus Wiggs, III, *Commentary on the Bill of Rights in the Mississippi Constitution of 1890 and Beyond*, 56 MISS. L.J. 73, 102 (1986).

[58] MISS. CONST. of 1817 art. I, § 14; MISS. CONST. of 1832 art. I, § 14; MISS. CONST. of 1869 art. I, § 28. For similar provisions, see ALA. CONST. art. I, § 13; ARIZ. CONST. art. II, § 11; ARK. CONST. art. II, § 13; CONN. CONST. art. I, § 110; DEL. CONST. art. I, § 9; FLA. CONST. art. I, § 21; ILL. CONST. art. I, § 12; *Ind. Const.* art. I, § 12, KY. CONST. Bill of Rights § 14; ME. CONST. art. I, § 19; MINN. CONST. art. I, § 8; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.H. CONST. pt I, art. 14; N.C. CONST. art. I, § 18; N.C. CONST. art. I, § 18; ORE. CONST. art. I, § 10; PA. CONST. art. I, § 11; R.I. CONST. art. I, § 5; S.C. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. I, § 13; UTAH. CONST. art. I, § 11; VT. CONST. ch. 1, art. 4; WASH. CONST. art. I, § 10; W. VA. CONST. art. III, § 17; WIS. CONST. art. I, § 9; WYO. CONST. art. I, § 8.

[59] 33 So. 2d 810 (Miss. 1948).

However, these cases are not representative of the current state of the law or the composition of the court. Clearly, the Mississippi Constitution limits the Legislature's power to enact certain legislation, despite the general pronouncements of *Grimes*.[65] Furthermore, *Presley v. Mississippi State Highway*

---

[60] *Miles*, 33 So. 2d at 814. The court found that a county board of supervisors violated § 24 when it held a secret session. *Id.*; *see also* Mississippi v. McPhail, 180 So. 387, 392 (Miss. 1938) (stating that § 24 has been uniformly construed to afford judicial remedy for every unlawful violation of named rights).

[61] 71 So. 2d 433 (Miss. 1954).

[62] *Walters*, 71 So. 2d at 446. In *Walters*, the court examined several state constitutional attacks on the Workman's Compensation Act. *Id.* at 445. These challenges were based on the right to access to the courts, right to a jury trial and the separation of powers doctrines. *Id.* at 445-46. The practical application of the Workman's Compensation Act provided for judicial review of workman's compensation claims. *Id.* at 446. The court concluded that the Workman's Compensation Act did not violate § 24 since the Legislature had the authority to legislate in this area. *Id.*

[63] 930 F.2d 441 (5th Cir. 1991).

[64] *Grimes*, 930 F.2d at 443. The issue in *Grimes* was the sovereign immunity statute enacted by the Mississippi Legislature in 1985. *Id.* The statute required the Mississippi courts to continue to apply the case law of sovereign immunity as it existed immediately before the Mississippi Supreme Court abolished this common law doctrine. *Id.* The court determined that this act was not a violation of § 24 because the Legislature had sufficient power to carve out exceptions to the abolition of sovereign immunity. *Id.*

[65] *Id.* There are numerous examples of state constitutional restrictions on legislative powers. For instance, the Mississippi Constitution strictly prohibits commingling of the three branches of government. MISS. CONST. art. I, §§ 1, 2. Additionally, the Legislature shall not approve legislation which specially benefits individuals or corporations. MISS. CONST. art. IV, § 87. Finally, article IV, §§ 91-100

Commission effectively overruled the *Erie*-interpretation of Mississippi's sovereign immunity statute found in *Grimes.*[66] Finally, the Legislature's ability to change or abolish the common law remedies and methods of procedures announced in *Walters* must be re-examined in light of the judicial adoption of the Mississippi Rules of Civil Procedure and the Mississippi Rules of Evidence.[67] The judicial adoption of these rules demonstrates the limits placed on the Legislature by the constitution and the inherent power granted to the supreme court to regulate court proceedings.

Thus, the validity of the precedent on section twenty-four must be questioned. The right of access to courts and the remedies provision of the Mississippi Constitution deserves a literal interpretation. The intent of this section was not to merely guarantee the public's right to observe the judiciary perform its duties, but also to guarantee that victims of injustice and injuries have the right to redress in state court.[68]

---

places ten more general "prohibitions" on legislative powers. *See* MISS. CONST. art. IV, § 91 (prohibiting special legislation and fees for counties); MISS. CONST. art. IV, § 95 (prohibiting donation of public lands); MISS. CONST. art. IV, § 98 (prohibiting lotteries). Moreover, the court in earlier decisions formally recognized the limits which the Mississippi Constitution has placed on the Legislature. Moore v. Grillis, 39 So. 2d 505, 509 (Miss. 1949). In *Moore*, the court held that a state constitution does not grant special legislative powers, but rather limits them. *Id.* The duty of the court, not the Legislature, is to construe the law. *Id.* Finally, the court must determine whether the state constitution authorized a piece of legislation. *Id.*

[66] 608 So. 2d 1288 (Miss. 1992). The issue in *Presley* was the constitutionality of the Sovereign Immunity Act. *Id.* at 1290. The Act required the courts to apply the doctrine of sovereign immunity as it existed immediately prior to the Mississippi Supreme Court's holding in Pruett v. City of Rosedale, 421 So. 2d 1046, 1052 (Miss. 1982). *Id.* at 1292-94. In *Pruett*, the court abolished the judicially created concept of sovereign immunity. *Pruett*, 421 So. 2d at 1052. After discussing the Legislature's reaction to *Pruett*, the court invalidated the statute as an unconstitutional attempt on the part of the Legislature to exceed its powers. *Presley*, 608 So. 2d at 1296.

[67] *See infra* notes 86-88 and accompanying text.

[68] *See* Donald B. Brenner, Note, *The Right of Access to Civil Courts Under State Constitutional Law: An Impediment to Modern Reforms, or a Receptacle of Important Substantive and Procedural Rights?*, 13 RUTGERS L.J. 399, 424 (1982) (acknowledging that access to court provisions are directed against denials of legal remedies). Access to courts provisions should not be incorporated into due process guarantees. *Id.* Access to courts provisions are important because they grant power to all citizens. *Id.* Finally, these provisions allow the court flexibility in fashioning equitable relief. *Id.*

The court should staunchly refuse attempts by the Legislature to curtail this vital right to redress wrongs, especially when the Legislature offers no reasonable alternative.

Other jurisdictions have tested the validity of statutory limits on non-economic and punitive damages and held such limits to be unconstitutional as violative of the right to access to courts and remedies provisions. In *Smith v. Department of Insurance*,[69] the Florida Supreme Court held that a $450,000 limit on non-economic damages in all personal injury actions violated the access to courts clause of the state constitution.[70] The Florida Supreme Court determined that the purpose of a right to court access clause was to redress injuries.[71] The court in *Smith* held that where a right of access to the courts and redress for injuries has become part of the common law, the Legislature cannot abolish the right without providing a reasonable alternative.[72] Also, the Texas Supreme Court in *Lucas v. United States*[73] held that a $500,000 cap for all damages in a medical malpractice action violated the right to court access clause of the Texas Constitution.[74] In comparison, the non-economic and punitive damage caps proposed in Mississippi are similar to the type held unconstitutional in *Smith* and *Lucas* and arguably would also violate this significant right to redress.[75]

---

[69] 507 So. 2d 1080 (Fla. 1987).

[70] *Smith*, 507 So. 2d at 1089. The Florida Constitution guarantees that the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay. FLA CONST. art. I, § 21. In *Smith*, the plaintiff directly challenged the constitutional validity of Florida's recently adopted Tort Reform and Insurance Act. *Smith*, 507 So. 2d at 1083.

[71] *Id.* at 1088. The access to courts clause in the Florida Constitution extended to suits both above or below any figure. *Id.* at 1087. There was judicial concern that if the Legislature could constitutionally cap damages at $450,000, there was no discernable reason why they could not cap damages at $50,000 or even $1. *Id.* at 1089.

[72] *Id.* at 1087. The court noted that a right secured at common law cannot be eliminated unless the Legislature satisfied one of two elements. *Id.* First, the Legislature could provide a reasonable alternative remedy. *Id.* Second, absent a reasonable alternative remedy, the Legislature must show an overpowering public necessity for abolishing this right. *Id.* The court held that the Legislature did not provide a reasonable alternative and failed to show any overpowering public necessity. *Id.* at 1089.

[73] 757 S.W.2d 687 (Tex. 1988).

[74] *Lucas*, 757 S.W.2d at 692. The Texas Constitution guarantees that all courts shall be open and that every person injured shall have a remedy by due course of law. TEX. CONST. art. I, § 13. The *Lucas* court determined that the Legislature failed to provide the plaintiff with an adequate substitute. Lucas, 757 S.W.2d at 690. The court also found that in two jurisdictions where damage caps were upheld, legislative

C. Separation of Powers

Article I, section one of the Mississippi Constitution of 1890 provides:

> The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.[76]

Article I, section two provides:

> No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others. The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments.[77]

These sections recently received substantial interpretation and clarification by the court. While the majority of these recent cases dealt with inappropriate encroachment on the legislative or executive sphere of authority,[78] these opinions provided significant guidance for a challenge to a statutory

---

enactment of a reasonable alternative weighed heavily in the decision. *Id.* at 691.

[75] *Smith*, 607 So. 2d at 1089; Lucas 757 S.W.2d at 692. *Contra* Samsel v. Wheeler Transp. Serv., 789 P.2d 541, 558 (Kan. 1990) (upholding $250,000 limit on non-economic damages in personal injury actions against "right to due course of law for injury suffered" provision of state constitution); Williams v. Kushner, 524 So. 2d 191, 196 (La. Ct. App. 1988) (upholding $500,000 cap on damages in medical malpractice action against access to court challenge); Prendergast v. Nelson, 256 N.W.2d 657, 663-64 (Neb. 1977) (upholding $500,000 damage limitation for medical malpractice action against access to courts challenge).

[76] MISS. CONST. art. I, § 1.

[77] MISS. CONST. art. I, § 2.

[78] *See* Kirksey v. Dye, 564 So. 2d 1333, 1336 (Miss. 1990) (holding that according to constitution, office of Lieutenant Governor combines both executive and legislative branches); Washington v. State, 478 So. 2d 1028, 1031 (Miss. 1985) (holding discretion in prosecuting habitual criminals did not violate separation of powers doctrine).

damage cap as violative of judicial autonomy. For instance, in *Alexander v. State ex rel Allain*,[79] the court in interpreting section one and two recognized that the Constitution of 1890 strengthened the mandate of separation of powers.[80] Also, in *Dye v. State ex rel Hale*,[81] the court held that the effect of sections one and two is that "no officer of one department may perform a function at the core of the power properly belonging to either of the other two departments."[82] Finally, in *Presley v. Mississippi State Highway Commission*[83] the court held that certain segments of the Sovereign Immunity Act were unconstitutional encroachments on the judiciary's power to regulate the common law.[84]

Thus, in light of the strong significance placed on section one and two by *Alexander* and the recognized power of the judiciary to regulate the common law in *Presley*, it is clear that a cap on non-economic and punitive damages could be found to unconstitutionally usurp the judiciary's power to enforce adequate remedies actionable at common law.[85] Additionally, the controversy surrounding the adoption of the Mississippi Rules of Civil Procedure,[86] the Mississippi Rules of Evidence,[87] and the Mississippi Supreme Court Rules[88] illustrate the jealously guarded authority that the judicial branch considers "inherently" within its core of power.[89]

---

[79] 441 So. 2d 1329 (Miss. 1983).

[80] *Alexander*, 441 So. 2d at 1335. The detailed construction of the separation of powers clause and the addition of a penalty for violation of section two of the 1890 Constitution was considered significant. *Id.* The court concluded that the history and language of the separation of powers doctrine in the 1890 Constitution was intended to strengthen the mandate prohibiting commingling of the branches of government. *Id.* The court considered the detailed construction of the separation of powers clause and the addition of a penalty for violation of § 2 of the 1890 Constitution significant. *Id.* The court concluded that the history and language concerning the separation of powers doctrine in the 1890 Constitution intended to strengthen the mandate against commingling of the branches of government. *Id.*

[81] 507 So. 2d 332 (Miss. 1987).

[82] *Dye*, 507 So. 2d at 343. The court also explained the relevance of *Alexander* in reaching this decision. *Id.*

[83] 608 So. 2d 1288 (Miss. 1992).

[84] *Presley*, 608 So. 2d at 1296. The court found that the judiciary had the sole responsibility of pronouncing the common law. *Id.* at 1295. The judiciary as a separate and co-equal branch of government may refuse to accept an incongruous or unduly burdensome statute. *Id.* at 1296. Finally, the court held that the statute requiring courts to apply the common law as it stood five years previous was an unconstitutional usurpation of their power to enforce the ever-changing common law. *Id.*

[85] *Alexander*, 441 So. 2d at 1335; *Presley*, 602 So. 2d at 1295-96. *Contra* Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1336 (D. Md. 1989) (upholding $350,000 limit

Finally, an examination of the administration of non-economic and punitive damages in Mississippi reveals that the judiciary can very capably enforce such damages as it has an excellent record in granting reasonable and appropriate non-economic and punitive damages. The court has only affirmed

---

on non-economic damages in personal injury cases against separation of powers challenge).

[86] Order Adopting Mississippi Rules of Civil Procedure, May 26, 1981. The judicial adoption of these rules sparked an intense controversy between the Legislature and the Mississippi Supreme Court. *Forward to Symposium on Mississippi Rules of Civil Procedure*, 52 MISS. L.J. 1, 2 (1982). Many legislators attempted to remove some justices from the bench. William H. Page, *Constitutionalism and Judicial Rulemaking: Lessons from the Crisis in Mississippi*, 3 MISS. C. L. REV. 1, 7 (1982). The controversy eventually subsided when the supreme court sent letters to each state trial judge reaffirming the Mississippi Rules of Civil Procedure and strongly asserted its prerogative to make rules regulating court proceedings. *Id.* at 9. This controversy also sparked a commentary blitz over the appropriate authority of the judiciary pursuant to the Mississippi Constitution. *See* Ronald C. Morton, *Rules, Rulemaking and the Ruled: The Mississippi Supreme Court as Self-Proclaimed Ruler*, 12 MISS. C. L. REV. 293, 296-307 (1991) (analyzing controversy surrounding Mississippi Supreme Court's adoption of Mississippi Rules of Procedure and Evidence); R. Nash Neyland, *Civil Procedure*, 52 MISS. L.J. 399, 400-04 (1982) (analyzing importance and effect of judicial adoption of Mississippi Rules of Civil Procedure). *See generally* Guthrie T. Abbott, *The Proposed Mississippi Rules of Civil Procedure - An Argument for Adoption*, 49 MISS L.J. 285, 298 (1978) (arguing for adoption of revised Mississippi Rules of Civil Procedure).

[87] Order Adopting Mississippi Rules of Evidence, September 24, 1985. Again, the judicial adoption of the Mississippi Rules of Evidence sparked controversy between the Legislature and the Mississippi Supreme Court. *See* F. Keith Ball, *The Limits of the Mississippi Supreme Court's Rule-Making Authority*, 60 MISS L.J. 359, 370-73 (1990) (describing court's inherent power to make rules of evidence and procedure).

[88] Order Adopting the Mississippi Supreme Court Rules, June 5, 1987.

[89] Newell v. State, 308 So. 2d 71, 76 (Miss. 1975). In *Newell*, the court articulated that it possessed the inherent power to promulgate rules regulating procedure. *Id.* at 76. This power emanated from § 144 of the Mississippi Constitution and the separation of powers doctrine. *Id.* Also, in *Dye* the court zealously defended its prerogative to regulate procedure within the judicial department absent legislative restrictions. *Dye*, 507 So. 2d at 345.

punitive damages in limited and extreme circumstances.[90] In fact, between 1962 and 1992 the Mississippi Supreme Court affirmed only twenty-eight punitive damages awards.[91] Other nationwide studies revealed that there is certainly no explosion in punitive damage awards.[92] Moreover, it appears that these types of tort reform measures have had little effect on the cost of liability insurance, as premiums continue to increase.[93] This evidence illustrates that the judiciary can very capably enforce reasonable non-economic and punitive damages without legislative interference.

---

[90] Tideway Oil Programs v. Serio, 431 So. 2d 454, 460 (Miss. 1983). The court found punitive damages were not favored by the law and are only awarded within narrow limits. *Id.* at 460 n.1. The plaintiff could not seek or receive punitive damages for vengeance. *Id.* at 461. Finally, there is no absolute right to recover punitive damages. *Id.*; *see* Standard Life Ins. Co. v. Veal, 354 So. 2d 239, 247 (Miss. 1979) (holding punitive damages should be allowed cautiously). *See generally* AMERICAN MEDICAL ASS'N, SPECIAL TASK FORCE ON PROF. LIAB. AND INS., PROFESSIONAL LIAB. IN THE '80S, Report 2, at 18 (Nov. 1984) (finding punitive damages awards rare in medical malpractice actions).

[91] MISSISSIPPI LAW RESEARCH INSTITUTE, PUNITIVE DAMAGES VERDICTS AFFIRMED BY THE MISSISSIPPI SUPREME COURT, 1962-1992, at 1 (1992). Additionally, there were only eight medical malpractice actions affirmed by the Mississippi Supreme Court from 1962 to 1992. *Id.* at 4. There were only fifteen product liability actions upheld by the court during the same twenty years. *Id.* at 3. Finally, for the same period there were only six product liability actions upheld by the Fifth Circuit Court of Appeals. *Id.* at 2.

[92] Prentice & Roszkowski, *supra* note 3, at 262. Numerous studies reveal that courts award punitive damages only in rare cases. Robert Gibbons, *Propositions Built on Myth*, NAT'L L.J. 18 (Oct. 7, 1991). For example, there were only 355 punitive damage awards in product liability cases between 1965 and 1990 for the entire United States. *Id.* Another study examined 25,627 cases in forty seven different judicial districts from 1981 to 1985 and found punitive damages awarded in only 4.9% of the cases. Daniels & Martin, *supra* note 10, at 31.

[93] UNITED STATES GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE: SIX STATE CASE STUDIES SHOW CLAIMS AND INSURANCE COST STILL RISE DESPITE REFORMS 14 (Dec. 1986). The GAO studied six states, Arkansas, California, Florida, Indiana, North Carolina and New York which had recently adopted medical malpractice tort reforms. *Id.* at 3. The type of tort reforms adopted included caps on attorney's fees, elimination of the collateral source rule and statutory limits on damages. *Id.* Despite the efforts to limit the size and frequency of claims, insurance costs in each state increased between 1980 and 1986. *Id.* at 14.

D. Prohibition Against Special Privileges

Article IV, section eighty-seven of the Mississippi Constitution of 1890 provides:

> No special or local law shall be enacted for the benefit of individuals or corporations, in cases which are or can be provided for by general law, or where the relief sought can be given by any court of this state; nor shall the operation of any general law be suspended by the Legislature for the benefit of any individual or private corporation or association, and in all cases where a general law can be made applicable, and would be advantageous, no special law shall be enacted.[94]

The majority of opinions interpreting section eighty-seven involve an individual or corporation receiving special privileges from the Legislature through monetary compensation.[95] In other section eight-seven cases the court prohibited "county-wide" local and private legislation which acted specially to an individual county's benefit or exclusion.[96] Arguably, a cap on non-economic or punitive damages would violate section eighty-seven as such a cap would operate to the benefit of an individual physician or corporation in a products liability or medical malpractice action. This argument was upheld in *Wright v. Central Du Page Hospital Ass'n*[97] where the Illinois Supreme Court determined a $500,000 cap on damages in medical malpractice actions violated the Illinois Constitution's special privileges clause.[98] Thus, if the Legislature specially tailors a tort reform measure to limit damages for corporations in product liability actions or a physician in medical malpractice actions, it would violate section eighty-seven as special legislation where a general law or existing court remedy would apply.

---

[94] MISS. CONST. art. IV, § 87.

[95] *See* Beall v. Board of Supervisors, 3 So. 2d 839, 844 (Miss. 1941) (holding statute which provided for reimbursement of sheriff by board of supervisors violated § 87); Feemster v. City of Tupelo, 83 So. 804, 806 (Miss. 1920) (holding purpose of § 87 was to prevent special laws for private corporations). *See generally* White v. Gautier Util. Dist., 465 So. 2d 1003, 1015-17 (Miss. 1985) (upholding statute which created individual county board of utilities).

[96] *See* Smith v. Transcontinental Gas Pipeline Corp., 310 So. 2d 281, 285 (Miss. 1975) (holding statute which effectively excluded one county violated § 87); *see also* Rolph v. Board of Trustees, 346 So. 2d 377, 379 (Miss. 1977) (holding statute allowing for different substantive rules regarding governmental immunity for county hospital violated § 87).

[97] 347 N.E.2d 736 (Ill. 1976).

IV. CONSTITUTIONALITY OF ABOLITION OR MODIFICATION OF THE COLLATERAL SOURCE RULE

The second most popular tort reform measure considered by the Mississippi Legislature over the past decade has been the abolition or modification of the collateral source doctrine.[99] Several jurisdictions have adopted measures which would require any damage award be offset by certain collateral sources of compensation,[100] while other jurisdictions have statutorily deemed evidence of collateral sources admissible.[101]

---

[98] *Wright*, 347 N.E.2d at 743. Article IV, § 13 of the Illinois Constitution prohibits the General Assembly from passing a special or local law when a general law can be made applicable. ILL. CONST. art. IV, § 13. In *Wright*, the court applied an equal protection analysis to the special privileges clause. *Wright*, 347 N.E.2d at 741. The court found that the statute capping damages was arbitrary and failed to provide a sufficient quid pro quo. *Id.* at 743.

[99] *See supra* note 1 and accompanying text. Critics argued that the cumulative recovery effect of the collateral source rule has become an irrelevant principle. Robert A. Sedler, *The Collateral Source Rule and Personal Injury Damages: The Irrelevant Principle and Functional Approach*, 58 KY. L.J. 36, 63 (1969). The collateral source rule was developed under very different circumstances than that involving the present day collateral income of insurance, sick leave and Social Security. *Id.* Therefore, a new solution seems necessary. *Id.* Other commentators have defended the equity of the collateral source rule. Hal Sanders, *The Texas Collateral Source Rule: A Critical Survey*, 54 TEX. L. REV. 791, 805 (1976). Sanders argued that the collateral source rule prevents jury confusion. *Id.* Also, the injured party, not the wrongdoer, deserves any benefits involving multiple compensation. *Id.*

[100] COLO REV. STAT. § 13-21-111.6 (1987); CONN. GEN. STAT. § 52-225(a) (1991); FLA. STAT. ANN § 766.207(7)(a) (West Supp. 1993); IOWA CODE ANN. § 147.136 (West 1990); MICH. COMP. LAWS ANN. § 600.6303 (West 1990); MINN. STAT. ANN. § 548.36 (West 1991); MONT. CODE ANN. § 27-1-308 (West 1987); NEV. REV. STAT. § 42.020 (West 1987); N.Y. CIV. PRAC. L. & R. §§ 4545(a), 4545(b), 4545(c) (McKinney 1992); N.D. CENT. CODE § 32-03.2-06 (Supp. 1993); OHIO REV. CODE ANN. § 2305.27 (Anderson 1991); TENN. CODE ANN. § 29-26-119 (1980); UTAH CODE ANN. §78-14-4.5 (1987).

[101] ALA. CODE § 6-5-545 (1993); ALASKA STAT. § 09.17.070 (Supp. 1993); CAL. CIV. CODE § 333.1 (West Supp. 1988); DEL. CODE ANN. tit. 18, § 6862 (Supp. 1988); IND. CODE ANN. § 34-4-36-2 (West Supp. 1993); R.I. GEN. LAWS § 9-19-34.1 (Supp. 1988); S.D.

The Mississippi Legislature has considered several bills which would require a mandatory damage set-off by the amount of certain collateral sources.[102] Also, the Legislature has considered statutory proclamations that deem collateral sources of compensation as admissible evidence.[103] This section will test the constitutionality of abrogating the collateral source rule against the right to due process,[104] right to a trial by jury[105] and separation of powers doctrine[106] of the Mississippi Constitution of 1890. Again, this section will attempt to demonstrate the legislative error in enacting tort reform measures without considering the substantive provisions of the Mississippi Constitution.

A. Due Process

Article III, section fourteen of the Mississippi Constitution of 1890 provides that "[n]o person shall be deprived of life, liberty or property except by due process of law."[107] Unfortunately, section fourteen does not contain an equal protection guarantee like its federal counterpart.[108] The interpretation of this section by the Mississippi courts has dealt largely with criminal cases.[109] Nevertheless, a representative portion of cases have interpreted this section for civil actions, and at least one jurisdiction has held that the near abolition of the collateral

---

CODIFIED LAWS ANN. § 21-3-12 (1987).

[102] *See supra* note 1 and accompanying text.

[103] *See supra* note 1 and accompanying text.

[104] MISS. CONST. art. III, § 14.

[105] MISS. CONST. art. III, § 31.

[106] MISS. CONST. art. I, §§ 1, 2.

[107] MISS. CONST. art. III, § 14.

[108] Munford & Wiggs, *supra* note 57, at 92. If a state's due process clause does not expressly provide for an equal protection guarantee, some jurisdictions have implied an equal protection guarantee under a due process clause. Munford & Wiggs, *supra* note 57, at 92. Mississippi thus far has declined to join these jurisdictions. Munford & Wiggs, *supra* note 57, at 92.

[109] *See* Smith v. State, 580 So. 2d 1221, 1226-27 (Miss. 1991) (holding due process clause does not protect expectation of release on probation); Lockett v. State, 517 So. 2d 1317, 1329 (Miss.) (holding defendant not denied due process), *cert. denied*, 487 U.S. 1210 (1987).

source doctrine violated a litigant's due process rights.[110] In *Arneson v. Olson*,[111] the North Dakota Supreme Court held that the near-abolition of the collateral source doctrine, when considered in light of other provisions in the tort reform legislation, violated a medical patient's due process rights.[112] Similarly, in *Morris v. Savoy*[113] the Ohio Supreme Court held that a $200,000 limit on general damages in a medical malpractice action violated the state constitution's due process guarantee.[114]

B. Additional Constitutional Challenges

Other provisions of the Mississippi Constitution of 1890 would apply more readily and effectively to the legislative abolition of the collateral source doctrine. Arguably, many of the same provisions challenging the constitutionality of statutory damage caps would pertain to legislative tampering with the collateral source doctrine. For instance, legislative modification of the collateral source rule would violate the separation of powers doctrine by attempting to over-regulate the admissibility of evidence according to the recent decision of *Hall v. State.*[115] In *Hall*, which posed a challenge to the constitutionality of the Evidence of Child Sexual Abuse Act, the court held that the making of rules of evidence was a function at the core of the judicial power.[116] Furthermore, by ordering implementation of the Mississippi Rules of Evidence, the court made the "ultimate authoritative declaration" that the making of rules of evidence lies on "judicial turf."[117] Finally, abolition of the collateral source doctrine would violate a litigant's right to a jury trial as it existed at the time of the adoption of the Mississippi Constitution.[118]

---

[110] *See* French Drug Co. v. Jones, 367 So. 2d 431, 436 (Miss 1978) (upholding medical privilege statute); Genesco, Inc. v. J.C. Penney Co., 313 So. 2d 20, 23-24 (Miss. 1975) (holding blue laws did not violate § 14); Hattiesburg Firefighters Local 184 v. City of Hattiesburg, 263 So. 2d 767, 771 (Miss. 1972) (holding ordinance requiring civil service employees to live within city limits did not violate § 14); Mississippi Milk Comm'n. v. Vance, 129 So. 2d 642, 653-54 (Miss. 1961) (upholding Milk Control Act against § 14 challenge). *See generally* Smith, *supra* note 7, at 220 (stating courts in several jurisdictions have invalidated abdication of collateral source rule in medical malpractice cases utilizing due process and equal protection guarantees).

[111] 270 N.W.2d 125 (N.D. 1978).

[112] *Arneson*, 270 N.W.2d at 137. The judiciary expressed concern with the cumulative effect of the various tort reform measures. *Id.* The court found the statute arbitrary, unreasonable and discriminatory. *Id.* Finally, the tort reform methods adopted had no reasonable relation to the attainment of the desired results. *Id.*

[113] 576 N.E.2d 765 (Ohio 1991).

[114] *Morris*, 576 N.E.2d at 771. The court's function was to decide if this tort reform bore a real and substantial relationship to public health and welfare or instead was unreasonable or arbitrary. *Id.* at 770. After review of the legislation, the court held the Act unconstitutional because it did not bear a real and substantial relationship to public health and welfare and was unreasonable and arbitrary. *Id.* at 771.; *see also* Condemarin v. University Hosp., 775 P.2d 348, 360-64 (Utah 1989) (holding $100,000 limit on damages violated due process guarantees of state constitution).

---

[115] 539 So. 2d 1338 (Miss. 1989).

[116] *Hall*, 539 So. 2d at 1339-40. The issue in *Hall* was the credibility of certain hearsay testimony. *Id.* at 1343. The court deemed the "garden variety hearsay" offered by two social workers admissible according to the Evidence of Child Sexual Abuse Act, but prohibited by Rule 802 of the Mississippi Rules of Evidence. *Id.* at 1343-44. The court held the admission of this hearsay testimony deprived the defendant of his right to a fair trial and voided the statute. *Id.* at 1348. *See generally* CAROLYN E. STATON, ELLIS AND WILLIAMS: MISSISSIPPI EVIDENCE, 81 (2nd ed. Supp. 1993) (analyzing *Hall v. State* in light of Rule 802 of Mississippi Rules of Evidence).

[117] *Hall*, 539 So. 2d at 1346; *see* MISS. CONST. art. VI, § 144 ("[T]he judicial power shall be vested in a Supreme Court and such other courts as are provided for in this constitution."). Two excellent examples of the judiciary's inherent authority to regulate evidence is found implicitly in a comparison of Rules 402 and 802 of the Federal Rules of Evidence with Rules 402 and 802 of the Mississippi Rules of Evidence. *Compare* FED. R. EVID. 402 and FED. R. EVID. 802 *with* MISS. R. EVID. 402 and MISS. R. EVID. 802. The Federal Rule 402, which regulates relevancy, grants Congress the power to amend relevancy standards by appropriate legislation. FED. R. EVID. 402. However, Mississippi's Rule 402, which was patterned on the federal rule, does not grant the Mississippi Legislature reciprocal authority to amend standards of relevance on the state level. MISS. R. EVID. 402. Similarly, Federal Rule 802, which prohibits hearsay testimony, allows Congress authority to proscribe exceptions to the hearsay rule. FED. R. EVID. 802. Again, Mississippi Rule 802 does not grant the Mississippi Legislature any authority to proscribe exceptions to the hearsay rule. MISS. R. EVID. 802. Due to the fact that the court unilaterally adopted the Mississippi Rules of Evidence, it is significant that the Mississippi Supreme Court did not grant the Mississippi Legislature the same powers which the United States Supreme Court granted Congress in Rules 402 and 802.

[118] Nelson, *supra* note 46, at 568. Nelson argued that the Alabama Tort Reform Act violated the right to a trial by jury as it existed at the adoption of the Alabama Constitution of 1901. Nelson, *supra* note 46, at 568; *see also* Farley v. Engelken 740 P.2d 1058, 1068 (Kan. 1987) (holding abrogation of collateral source rule violated equal protection guarantee of state constitution).

V. CONCLUSION

The perceived crisis in tort litigation and insurance costs have lead to a plethora of legislative proposals that purport to materially alter the tort system. The two most popular proposals in Mississippi, as well as the majority of other jurisdictions, have been a cap on non-economic and punitive damages and alteration of the collateral source rule. While these two proposals may be appealing in both an economical and political sense, they each present serious social, legal and constitutional difficulties. Caps on non-economic and punitive damages were held to violate the right to trial by jury,[119] the right to court access and remedies clauses,[120] the separation of powers doctrine[121] and the prohibition of special legislation clauses[122] in numerous jurisdictions. Also, several courts found that the abolition or modification of the collateral source rule was held unconstitutional under various state constitutions when applied to due process,[123] separation of powers clauses[124] and right to trial by jury.[125] Considering the textually similar language contained in the Mississippi proposals, a cap on damages and an abolition of the collateral source rule would arguably violate the same constitutional provisions in Mississippi's Constitution. While the Mississippi Legislature has failed to formally adopt a cap on damages or alter the collateral source rule, the Legislature has shown a propensity to adopt caps on damages in other types of actions. As illustrated above, the Sovereign Immunity Act placed a mandatory $50,000 cap on damages in actions against governmental entities for the next three years.[126] Furthermore, this Act imposes mandatory damages limits in cases brought against all governmental entities to $250,000 until July 1, 2001 and $500,000 thereafter.[127] This Act confirms that the Legislature is increasingly willing to adopt tort reform measures even where both legal and constitutional implications are involved. Interestingly, this statute may be susceptible to the same constitutional scrutiny as other damage caps and its constitutional validity should be questioned.[128]

---

[119] *See supra* notes 45-53 and accompanying text.

[120] *See supra* notes 69-75 and accompanying text.

[121] *See supra* notes 79-84, and accompanying text.

[122] *See supra* notes 97, 98 and accompanying text.

[123] *See supra* notes 107-14 and accompanying text.

[124] *See supra* notes 115, 116 and accompanying text.

[125] *See supra* note 118 and accompanying text.

[126] MISS. CODE ANN. § 11-46-15 (Supp. 1993); *see supra* note 13 and accompanying text.

The practical effect of a cap on non-economic or punitive damages and abolition of the collateral source rule should also be questioned. Such limitations merely serve to bestow the greatest benefit on the most egregious offender and further aggravate the victim's injury.[129] Further, the purpose of punitive damages, which has been judicially and legislatively declared to be that of punishing the offender, would become meaningless if the amount was capped.[130] A recurring problem with the damage limitations adopted in other jurisdictions is the specific amount of the limit. The Legislature wants to prevent grossly disproportionate damage awards, but cannot severely restrict a litigant's right to redress. Furthermore, if the Legislature acted to limit the amount of damages to an arbitrary figure, say $250,000, what would prevent the enactment of legislation mandating a cap of "$50,000, or $1,000, or even $1."[131] Finally, it now appears that these statutes which attempted to modify the tort system did not fulfill their intended purpose as evidenced by the continued rise in insurance premiums.[132]

---

[127] MISS. CODE ANN. § 11-46-15(1)(b) - (c) (Supp. 1993).

[128] Just as with non-economic and punitive damages caps, a strong argument can be made that a $50,000 cap on all damages against a governmental entity violates the right to a trial by jury, the right to access to courts and the separation of powers clauses of the Mississippi Constitution of 1890. However, there is strong precedent which suggests that this statute may pass constitutional scrutiny. *See* Richardson v. Rankin County School Dist., 540 So. 2d 5, 5 (Miss. 1989). In *Richardson*, the court held that the Legislature adopted appropriate legislation when it limited a governmental entity's liability to $50,000. *Id.* at 8. Nevertheless, the court emphasized that *Richardson* did not challenge the constitutionality of the statute limiting a governmental entity's liability. *Id.* at 8-9. Therefore, the constitutionality of MISS. CODE ANN. 11-46-15 remains an open question. Interestingly, the Legislature included a "savings" clause for this chapter. MISS. CODE ANN. § 11-46-23 (Supp. 1993).

[129] Rabin, *supra* note 9, at 40; Nelson, *supra* note 46, at 547.

[130] *See* Yazoo & Miss. Valley R.R. v. May, 61 So. 449, 450 (Miss. 1913). The recognized purpose for punitive damages is punishment for wrongdoing. *Id.* Furthermore, the Legislature has codified certain court practices for the imposition of punitive damages. MISS. CODE ANN. § 11-1-65 (Supp. 1993). *See generally* RESTATEMENT (SECOND) OF TORTS § 908 (1979) (illustrating that punitive damages are punishment for outrageous conduct).

This evidence demonstrates the folly of hasty implementation of legislation labeled as tort reform without considering the social, economic, constitutional, and legal implications. The number of reform acts held unconstitutional in other jurisdictions, and the number of statutes subsequently repealed, is further evidence of past legislative mistakes.[133] In order to avoid the same mistakes, the Mississippi Legislature should consider the constitution and well settled rules of tort law before adopting future tort reform measures. Hopefully as the judiciary has traditionally had an excellent record of upholding reasonable damage awards, both non-economic and punitive, it should remain the branch which develops rational and plausible tort reform.[134]

R. Brittain Virden

---

[131] Smith v. Department of Ins., 507 So. 2d 1080, 1089 (Fla. 1987).

[132] *See supra* note 93 and accompanying text.

[133] *See* Smith, *supra* note 25, at 199; Nelson, *supra* note 46, at 533. Of the 19 states that adopted legislation limiting damages, three statutes have been repealed and seven have been held unconstitutional. *See supra* notes 7, 27, 28, 30 and accompanying text.

[134] *See generally* Teresa M. Schwartz, *Product Liability Reform by the Judiciary*, 27 GONZ. L. REV. 303, 309-32 (1992) (discussing judicial tort reform).

SUBJECT INDEX

CORPORATIONS

- Securities Act Exemptions 270-323
  - Exemption for Compensatory Plans and Contracts:
    - Rule 701 286-306
  - Intrastate Exemption 306-23
  - Private Placement Exemption 270-86
- Small Business Financing
  - Mississippi Blue Sky Exemptions 323-61
  - Principal Exemptions 326-54
    - - Domestic Issuer Limited Offering Exemption:
      - Rule 705 344-47
    - - Employee Benefit Plan Transactions:
      - Section 75-71-201(11) 349-51
    - - Existing Security Holders Exemption:
      - Section 75-71-203(11) 347-49
    - - Institutional Exemption:
      - Section 75-71-203(*) and Rule 103(G) 327-32
    - - Limited Offering Exemption:
      - Section 75-71-203(9) 332-38
    - - Relationship Among Exemptions 351-54
    - - Uniform Limited Offering Exemptions:
      - Rule 703 338-44
  - SCOR Form U-7 355-58
  - Suggested Revisions 358-61
- Small Business Securities Exemptions
  - Regulation D 142-222
    - Elements of Regulation D Offering 161-222
    - - Definitions 171-80
    - - Information Delivery Requirements 180-95
    - - Integration 195-04
    - - Manner of Offering Limitations 204-13
    - - Notice of Sale Requirements 220-22
    - - Resale Limitations 213-20
  - Rule 504 150-57

- Rule 505 157-59
- Rule 506 159-61
- Rule 508 222-26

DAMAGES

- Punitive Damages in Mississippi 583-646
  - Chancery Court Developments 610-13
  - Constitutional Challenges 613-20
    - Court of Appeals for the Fifth Circuit Cases ... 617-19
    - Mississippi Supreme Court Cases 619-20
    - United States Supreme Court Cases 613-17
  - Legislative Action 622-42
    - House Bill 1270 622-26
    - Section 11-1-65 of the Mississippi Code 626-42
  - Target Defendants 584-610
    - Cotton Industry 589-90
    - Electric Utilities 593-94
    - Financial Institutions 606-08
    - Highway Users 594-600
    - Insurance Companies 600-06, 609-10
    - Other Carriers for Hire 589
    - Railroad Industry 584-89, 609
    - Telegraph, Express & Telephone Companies 591-93, 608-09

ENVIRONMENTAL LAW

- Limitations on Environmental Alternatives 444-71
  - A Conceptual Problem: How Far Does the Inquiry Go? 445-50
  - A Practical Problem: Who Wants to Know? 450-55
  - A Problem of Fatigue: Can Anyone Stay the Course? 455-62
  - A Problem in the Courts: Can Alternative Tests Survive Judicial Review 462-70
- National Resources Management and Alternative Standards 431-44
- Pollution Control and Alternative-Based Standards 408-31

EVIDENCE

- Admissibility of Scientific Expert Opinion
  - Arguments for Application of *Daubert* Test 505

- Background Information 473-74
- *Daubert*'s Effect on Mississippi State Courts 499-505
  - Mississippi Rule 702 500-04
  - Mississippi Rule 703 504-05
- *Daubert*'s Impact 490-99
  - Procedures for *Daubert* Challenges............. 496-99
  - Role of the Judiciary 490-96
    - Use of Discovery 491-92
    - Use of Federal Rules to Attack Testimony. 492-96
- *Daubert* Test for Admissibility 478-90
  - Analysis of Federal Rules of Evidence........... 480-89
    - Rule 104(a).............................. 484-87
    - Rule 702 480-84
    - Rules 703 & 403 487-89
- Conventional Safeguards in Litigation 490
- Procedural History 478-80
- *Frye* Test for Admissibility........................ 474-77

Spoliation Tort
- Arguments in Favor of Spoliation Tort 244-46
- Background Information 227-29
- Party to Litigation as Actor........................ 234-38
- Public Policy Concerns.............................. 246-47
- Remedies Under Mississippi Law 229-34
  - Criminal Sanctions 229-30
  - Discovery Sanctions 230-32
  - Spoliation Inference 232-34
- Third Party as Actor 239-44
  - Intentional Spoliation........................... 239-40
  - Negligent Spoliation 240-44

LAMAR, L.Q.C.
- Bibliography.. 91-98
- Black Voting Rights Article 60-66
- Democrat from Mississippi.................... 15-30, 120-23
- Early Years 6-15, 109-15
  - Civil War 12-15, 113-15
  - Early Political Career 10-12, 112-13
- Judicial Career 31-40, 115-20
- Legacy 123-27
- *Neagle, In re* (background and text of opinion)........... 234-37
- Senate Speeches
  - Grant on the Retire List of the Army 49-50

    - National Aid to Education 50-59
- Sumner Eulogy 42-48
- Table of Cases 98-106

POLITICS

- Political Advertising in Mississippi
    - Arguments in Favor of Change 526-35
        - Suggestions for Reform 529-35
    - Campaign Disclosure Requirements 520-26
        - First Amendment Considerations 521-22
        - Statutory Defects 522-25
        - Suggestions for Reform 525-26
    - Campaign Falsity Laws 510-19
        - First Amendment Considerations 510-12
        - Statutory Defects 512-15
        - Suggestions for Reform 515-19
    - First Amendment Impact on Regulation 509-10

PRODUCTS LIABILITY

- Are Punitive Damages Recoverable 733-45
- Breach of Warranty 723-28
- Elements of Proof in an Action 705-08
- Damages Recoverable in an Action 729-33
- Design Defects 708-15
- Does the Act Overrule the *Shainberg* Doctrine? 765-69
- Failure to Warn 718-23
- How the Act Changes the Mississippi Wrongful Death Act 753
- Law in the Wake of *State Stove Mfg. Co. v. Hodges* . 699-705
- Manufacturing or Construction Defects 717-18
- State of the Art Defense 715-17
- What Defenses are Available in an Action 745-53
- What Effect the Act Will Have on Business in Mississippi 769

SOVEREIGN IMMUNITY

- Abrogation of Common Law Sovereign Immunity in Mississippi 538-81
    - Background 538-41
- Abrogation of Judicially-Created Doctrine 541-47
    - Initial Assaults on Sovereign Immunity 541-44

    Mississippi Jurisprudence 544-47
        Pruett v. City of Rosedale 544-47
  Future for Governmental Immunity in Mississippi....... 568-80
    Legislative Policy of Sovereign Immunity 578-80
    Prospective Application of *Presley* 568-74
    Retroactive Legislation 574-78
  Legislative Response to *Presley* 563
    1992 Special Session................................ 563-64
    1993 Amendments to Sovereign Immunity Act 564-68
  Legislative Response to *Pruett* 547-553
    Restructuring the Act (1985-1992) 549-53
    Sovereign Immunity Act of 1984 547-49
  Mississippi Supreme Court Responds................... 553-63
    Growing Impatience 553-57
    Presley v. Mississippi State Highway Comm'n 557-63

TORTS

  Alienation of Affections
    Inference of Intentional Interference in Marital Relations as Proof of Alienation................ 249-65
  Allocation of Fault Among Joint Tortfeasors 647-96
    Analysis of the Comparative Fault Concept 658-94
    Apportionment of Fault to All Participants 662-71
      "Joint Tort-feasors" Analyzed 664-66
      "Party" Analyzed 666-71
      "Persons" Analyzed........................... 662-64
    Consideration of Fault in the Apportionment Process 671-74
      Effect of Allocating Fault to Settling Parties 675-80
      Requirement of Allocation Among Settling Parties............................... 671-80
    Employer Immunity 680-94
      Allocation Using Phantom Designations......... 685-87
      Allocation Without Phantom Designations 687-94
    Facial Ambiguities in the Mississippi Statute 660-62
  Background Information 648-57
    Equitable Underpinnings of the Mississippi Rule 653-57
    Mississippi's Comparative Fault Rule 648-53
  Complex/Mass Tort Litigation in Mississippi State Courts
    Background Information 373-84
      Causes 373-76
      Guides to Complex Litigation 376-83

  - Collection and Compilation of Mass Tort Data 363-69
  - Current Approaches to Case Management 370-73
    - Asbestos Litigation 370-72
    - Other Case Management Orders 372-73
  - Problems and Solutions in Mississippi 384-401
    - Class Actions as a Response 393-98
      - *Leaf River* Case 393-96
      - Rule 23 in Mississippi 396-98
    - Special Masters 398-701
    - Venue 386-93
- Informed Consent Under Mississippi Law 769-93
  - Background Information 769-70
  - Causation 784-86
    - Proximate Cause 785-86
    - "Prudent Patient II" Standard 784-85
  - Effect of *Barner v. Gorman* 786-91
    - Facts 786-87
    - Use of Consent Forms 787-90
    - Who Can Obtain Consent 790-91
- Individual Right to Privacy as the Basis of Informed Consent 770-73
- Physician's Duty and Breach Thereof 773-84
  - Disclosure Requirements 777-78
  - Exceptions to the Physician's Duty 778-80
  - Materiality of the Risk/"Prudent Patient I" Standard 775-77
  - Origin of the Duty 773-75
  - Plaintiff's Burden of Proof 780-84
- Spoliation of Evidence .... (See EVIDENCE)
- Tort Reform in Mississippi 795-822
  - Background 795
    - Constitutionality of Abolition or Modification of the Collateral Source Rule 816-18
    - Due Process 817-18
    - Other Constitutional Challenges 818-19
  - Constitutionality of a Statury Damage Limitation ... 801-16
    - Prohibition Against Special Privileges 815-16
    - Right to Court Access and Remedies Clause 801-11
    - Right to Trial by Jury 804-07
    - Separation of Powers 811-15
  - Proposed Litigation 800-01

ARTICLES

By Title

Allocation of Fault: Joint Tortfeasors in Court and the Ones Who Should Be .... *Cheri D. Green and Michael K. Graves* 647

An Evaluation of the Mississippi Products Liability Act of 1993 .... *Bobby Marzine Harges* 697

Complex/Mass Tort Litigation in State Courts in Mississippi .... *Guthrie T. Abbott and Pope S. Mallette* 363

Financing a Small Business in Mississippi: A Practitioner's Guide to Federal and State Securities Exemptions - Part I .... *Bryn Vaaler* 129

Financing a Small Business in Mississippi: A Practitioner's Guide to Federal and State Securities Exemptions - Part II .... *Bryn Vaaler* 267

From *Pruett to Presley*: The Long and Winding Road to Abrogation of Common Law Sovereign Immunity in Mississippi .... *Davis W. Case* 537

L.Q.C. Lamar .... *Michael H. Hoffheimer* 5

Lamar To Posterity - A Centennial Memoir .... *Daniel J. Meador* 107

Of BATs, Birds and B-A-T: The Convergent Evolution of Environmental Law .... *Oliver A. Houck* 403

The Pursuit of Deep Pockets: A Historical Overview of Punitive Damages in Mississippi .... *John G. Corlew* 583

ARTICLES

By Author

Michael K. Graves and Cheri D. Green
Allocation of Fault: Joint Tortfeasors in Court and the Ones Who Should Be 647

Cheri D. Green and Michael K. Graves
Allocation of Fault: Joint Tortfeasors in Court and the Ones Who Should Be 647

Bobby Marzine Harges
An Evaluation of the Mississippi Products Liability Act of 1993 697

Guthrie T. Abbott and Pope S. Mallette
Complex/Mass Tort Litigation in State Courts in Mississippi 363

Pope S. Mallette and Guthrie T. Abbott
Complex/Mass Tort Litigation in State Courts in Mississippi 363

Bryn Vaaler
Financing a Small Business in Mississippi: A Practitioner's Guide to Federal and State Securities Exemptions - Part I 129

Bryn Vaaler
Financing a Small Business in Mississippi: A Practitioner's Guide to Federal and State Securities Exemptions - Part II 267

Davis W. Case
From *Pruett to Presley*: The Long and Winding Road to Abrogation of Common Law Sovereign Immunity in Mississippi 537

Michael H. Hoffheimer
L.Q.C. LAMAR 5

Daniel J. Meador
LAMAR TO POSTERITY - A CENTENNIAL MEMOIR 107

Oliver A. Houck
OF BATS, BIRDS AND B-A-T: THE CONVERGENT EVOLUTION OF ENVIRONMENTAL LAW 403

John G. Corlew
THE PURSUIT OF DEEP POCKETS: A HISTORICAL OVERVIEW OF PUNITIVE DAMAGES IN MISSISSIPPI 583

COMMENTS

FRYE GONE, BUT NOT FORGOTTEN IN THE WAKE OF *DAUBERT*: NEW STANDARDS AND PROCEDURES FOR ADMISSIBILITY OF SCIENTIFIC EXPERT OPINION .... *Holley Davis Thames* 473

MISSISSIPPI MUDSLINGING: THE SEARCH FOR TRUTH IN POLITICAL ADVERTISING .... *Lance Conn* 507

OBTAINING A PATIENT'S CONSENT TO MEDICAL TREATMENT: INFORMED CONSENT UNDER MISSISSIPPI LAW .... *Walter Allen Davis & John Holaday* 775

SPOLIATION OF EVIDENCE: WHY MISSISSIPPI SHOULD ADOPT THE TORT .... *Maurcie L. Kervin* 227

TORT REFORM AND THE MISSISSIPPI CONSTITUTION OF 1890 .... *R. Brittain Virden* 801

RECENT DECISIONS

FAMILY LAW

ALIENATION OF AFFECTIONS—AN INFERENCE OF DEFENDANT'S INTENTIONAL INTERFERENCE IN PLAINTIFF'S MARITAL RELATIONS IS SUFFICIENT TO PROVE ALIENATION (*Kirk v. Koch*, 607 So. 2d 1220 (Miss. 1992)) .... *Phillip Sykes* 249

TABLE OF CASES

A

Abendroth v. Van Dolsen 103
Abrams v. United States 509, 530
ACI Chemicals, Inc. v. Metaplex, Inc. 246
Ackerberg v. Johnson 220
Adams v. Children's Mercy Hosp. . 805
Adams v. Johnston 651
Advanced Research Assocs. 214
Aetna Casualty & Surety Co. v. Steele 742
Aetna Life Ins. Co. v. Ward 100
Agent Orange, *In re* 494-95, 496
Air Crash Disaster at New Orleans, La., *In re* 481, 485, 493
Alameda Water & Sanitation Dist. v. Browner 465
Albright v. Oyster 39, 99
Alcorn County v. U.S. Supplies, Inc. 628
Alexander v. State *ex rel.* Allain .. 814
Alley v. Preshak Mach. Co. 747-48
Allen v. Gillette 105
Allen v. Ritter 642
Alliance to End Repression v. Rockford 231
Allman v. United States 103
American Family Ins. Co. v. Village Pontiac GMC, Inc. 235
American Frozen Food Inst. v. Train 457, 463
American Iron & Steel Inst. v. EPA 457
American Meat Inst. v. EPA 457
American Motorcycle Ass'n v. Superior Court 654, 660
American Paper Inst. v. EPA 457
American Paper Inst. v. Train 457
American Petroleum Inst. v. EPA (10th Cir. 1976) 457
American Petroleum Inst. v. EPA (5th Cir. 1981) 463, 457
American Petroleum Inst. v. EPA (5th Cir. 1989) 456
American Petroleum Inst. v. EPA (5th Cir. 1986) 456
American Ry. Express v. Bailey 593, 600
Anderson v. Burt 623
Anderson v. Eagle Motor Lines, Inc. 599
Anderson v. Fred Wagner & Ray Anderson, Jr., Inc. 579
Anderson v. Miller 104
Anderson v. National Carriers, Inc. 683, 687
Anderson v. State 542
Anderson v. Vanderslice 543
Andrew Jackson Life Ins. Co. v. Williams 605, 622, 626, 734-35, 742, 806
Anisodon v. Superior Ct. 772
Anthony v. Frith 640
Aponaug Mfg. Co. v. Carroll ... 503, 624
Archibald v. Mississippi & T.R. ... 389
Arizona v. Bible 500
Arizona v. Motorola 423
Armco, Inc. v. EPA 456
Armory v. Delamirie 228
Arneson v. Olson 820
Asbestos Personal Injury Cases Abrams Lead 370-71, 375
Associated Constr. & Eng'g Co. v. Worker's Compensation Appeal Bd. 683
Association of Data Processing Serv. Orgs., Inc. v. Camp 466
Association of Pac. Fisheries v. EPA 456, 457, 463

B

Bacon v. Northwestern Mut. Life Ins. Co. 103
Bailey v. Huling 255
Bailey v. Richards 245
Baker v. Fairbanks 804

Bankers Life & Casualty Co. v. Crenshaw 601-02, 612-13, 635, 733, 735, 742
Barker v. Bledsoe 231
Barner v. Gorman 773-74, 790-91, 793-95
Barnes v. Mississippi 775
Barnes v. Moore 775
Barrel of Fun, Inc. v. State Farm Fire & Casualty Co. 488, 489
Barrett v. Triangle Mining Corp. 271 281
Bartels v. City of Williston 655, 659 671, 674
Bartlett v. New Mexico Welding Supply Co. 655, 658
BASF Wyandotte Corp. v. Costle 457
Basic, Inc. v. Levinson 189
Batts v. Tow-Motor Forklift Co. 710
Bayond v. Ballard 281
Beall v. Board of Supervisors 817
Belk v. Roasamond 598, 626
Belk v. State Dept. of Pub. Welfare 388
Bell v. Morrison 583, 626, 629-30, 642
Benavides v. County of Wilson 493-94
Bendectin Litig. 478
Bene v. Jeantet 104
Berry v. Hinds County 542-43
Bersani v. EPA 439, 465
Beta Beta Chapter v. May 626, 633
Bevers v. Bradstreet 260
Biedenharn Candy Co. v. Moore 701
Bielski v. Schulze 659, 674
Black v. Robinson 590
Blue Cross & Blue Shield v. Campbell 641
Blue Cross & Blue Shield v. Mass. 735
Board of Comm'rs v. Ridenour 661, 671
Board of County Comm'rs v. Rose 100
Board of Trustees v. Van Slyke 388
Bode v. Clark Equip. Co. 653, 683 686-87
Bollman, *Ex parte* 72-87
Bondu v. Gurvich 240-41
Bordelon v. Consolidated Georex Geophysics 671
Bornemann v. Norris 106
Botts v. Tow-Motor Forklift Co. 13
Bounds v. Watts 627
Bourjaily v. United States 485
Bowman v. Barnes 654, 656, 660, 671
Boydstun v. State 517, 528
Brabham v. Board of Supervisors of Hinds County 542
Bracken v. Champlin 259
Bracket v. California 671
Bradley v. Appalachian Power Co. 650, 660
Bradshaw v. Freightliner Corp. 682
Brancaccio v. Mitsubishi Motors Co. 235
Brannigan v. Usitalo 805
Braswell v. Economy Supply Co. 747-49
Brister v. Dunaway 255-56
Brock v. Merrell Dow Pharmaceuticals, Inc. 477 479, 485
Brooklyn Manhattan Transit Corp. 321
Broom v. Armstrong 101
Brown, *In re* 775-76
Brown v. District of Columbia 105
Brown v. Guarantee Trust & Safe Deposit Co. 104
Brown v. Keill 656-58, 671, 688
Brown v. Parker-Hannifin Corp. 481
Brown v. Reeves 393
Brown v. Vogt 261
Brown v. Wichita State Univ. 580
Browning-Ferris Industries, Inc. v. Kelco Disposal 614
Buck v. Bell 535
Buckaloo v. Johnson 240
Bullitt County v. Washer 104
Burns v. Burns 546
Burt v. Evory 102
Burton v. Fisher Controls Co. 683
Busch v. Carpenter 316, 322
Busell Trimmer Co. v. Stevens 101
Butler v. Flint Goodrich Hosp. 803
Button v. Knight 260
Buttrey v. United States Army Corps of Engineers 464
Byrd v. F-S Prestress, Inc. 503

C

C & C Trucking v. Smith . . . 621-22, 631, 633-34, 637, 643
Cadwalader v. Partridge 101
Calabrese v. Trenton State College 786
Calder c. Bull 574
Calvert Cliffs Coordinating Comm. v. United States Atomic Energy Comm. 463, 464
Camp v. Roberts 262
Canon v. Justice Court 521, 522, 525
Cantebury v. Spence 780, 784, 788
Capital Funds, Inc. v. SEC 308, 321
Capital Transport Co. v. McDuff . . 599
Cardwell v. Bechtol 775
Carl M. Loeb, Rhoades & Co., *In re* 136
Carlucci v. Piper Aircraft Corp. . . . 232
Carson v. Maurer 805
Caviness v. Derand Resources Corp. 195
Celotex Corp. v. Campbell Rooting & Metal Works, Inc. 653, 661
Central Bank v. Butler 607
Cerro Copper Prod. Co. v. Ruckelshaus 456
Chaffee County v. Potter 98
Chamberlin v. Arborundum Co. . . 682
Chaney v. Falling Creek Metal Prod., Inc. 682, 684-86
Chapman v. Barney 104
Chapman v. Dunn 281, 308, 314
Chemical Mfrs. Ass'n v. EPA (5th Cir. 1989) 452, 457, 463, 466
Chemical Mfrs. Ass'n v. EPA (883 F.2d 452
Chemical Mfrs. Ass'n v. EPA (885 F.2d 453, 457, 463
Chemical Waste Management v. EPA 424
Cherry v. Anthony 739
Chicago, St. L. & N.O. R.R. v. Scurr 586-87, 626
Chicago, St. P., M. & O. Ry. v. Roberts 99
Chinese Exclusion Case, Chae Chan Ping v. United States 33-34
Christopherson v. Allied Signal Corp. 477, 479, 481, 484, 488, 493, 495
Churchhill v. Pearl River Basin Div. Dist. 553-54, 568-69
Ciby-Geigy Corp. v. Murphree 643
Citizens Against Burlington, Inc. v. Busey 450, 455
Citizens Against the Refinery's Effects, Inc. v. EPA 419
Citizens to Preserve Overton Park v. Volpe 438, 464
Citizens to Preserve Overton Park v. Brinigar 450, 467
City of New York v. Exxon Corp. . 423
Clement v. Packer 40, 105
Coca-Cola Bottling Co. v. Reeves . 635
Coca-Cola Bottling Works v. Lyons 701-02
Cohens v. Virginia 542
Cole v. Wiggins 778, 785, 787, 791
Collins v. Wayne Corp. 498
Colonial Mortgage Co. v. Lee 627
Commercial Union Ins. Co. v. Upjohn 771
Commodore Corp. v. Bailey 734
Commonwealth v. Acquaviva 521
Commonwealth v. Dennis 524
Condemarin v. University Hosp. . . 820
Conkright v. Ballantyne of Omaha, Inc. 655, 659, 671
Connar v. West Shore Equip of Milwaukee, Inc. . . . 659, 668, 672, 683
Conservation Law Found. of New England, Inc. v. Reilly 467
Consolidated Am. Life Ins. Co. v. Toche 742
Cook Indus., Inc. v. Carlson 628
Cook v. Corbett 519
Cooper Stevedoring Co. v. Fritz Kopke, Inc. 661
Copeland v. Robertson 778
Coplin v. Francis 571-72
Corbin v. Gould 102
Corcoran v. United Healthcare, Inc. 775
Corn Refiners Ass'n v. Costle 463
Corrosion Proof Fittings v. EPA . . 428
Cottle v. Johnson 260
Coulter v. Renshaw 258

County of Solano v. Delancy ... 228, 243 245-46
County of Yalobusha v. Carbry ... 541
Cox v. Laws ... 701
CPC Int'l, Inc. v. Train ... 457, 463
Cragin v. Powell ... 104
Creason v. Myers ... 254
Crenshaw v. United States ... 102
Crocker v. Sears, Roebuck & Co. ... 707 725, 727
Cross v. Allen ... 99
Crouch, *Ex parte* ... 71
Crown Simpson Pulp Co. v. Costle ... 417
Culbertson v. Mernitz ... 784
Cumberland Tel. & Tel. Co. v. Baker ... 591
Cumberland Tel. & Tel. Co. v. Hobart ... 591
Cumberland Tel. & Tel. v. Paine ... 592
Cumberland Tel. Co. v. Allen ... 592
Cunningham v. Lanier ... 793
Cunningham v. Mitchell ... 230
Cunningham v. Neagle ... See Neagle, *In re*
Currie v. Cayman Resources Corp. ... 196
Curtis, *Ex parte* ... 71
Curtis Publishing Co. v. Butts ... 512
Cunningham v. Lanier ... 793

D

D.F. Bernheimer & Co. ... 214
D.L. Fair Lumber Co. v. Weems ... 600, 638
DaFonte v. Up-Right, Inc. ... 666
Dame v. Estes ... 595-96
Daubert v. Merrell Dow Pharmaceuticals, Inc. ... 473, 476, 478-79, 480, 481, 482, 483-84, 485, 486, 487, 489, 490, 493, 495, 498
Davenport v. St. Paul Fire & Marine Ins. Co. ... 609-10
Davidson v. Shirley ... 793
Davis v. Little ... 541
DeAngelis v. Tarricone, Inc. ... 489
Deaton v. Delta Democrat Pub. Co. ... 775
Defenbaugh & Co. v. Rogers ... 607
DeLaughter v. Lawrence County Hosp. ... 232
Delaware City, Salem & Philadelphia Steamboat Navigation Co. v. Reybold ... 98
Deltona Corp. v. United States ... 464
Deluca v. Merrell Dow Pharmaceuticals ... 479, 483
Dement v. Summer ... 806
Dennis v. United States ... 136
Dent v. Ferguson ... 103
Depenbrok v. Kaiser Found. Health Plan ... 772
Depuy, Inc. v. Eckes ... 231
Detroit Marine Eng'g v. McRee ... 502
Deville Furniture Co. v. Jesco, Inc. ... 705
Dewine v. Ohio Elections Comm'n ... 517
DeWitt v. Berry ... 102
Dietz v. General Elec. Co. ... 655 657, 682, 690-91, 694
District of Columbia v. Hutton ... 98
Dix & Assoc. Pipeline Contractors v. Key ... 654, 683, 693
Dixon v. International Harvester Co. ... 502
Dobrient v. Ciskowski ... 261
Doherty v. Mississippi Power Co. ... 594
Doran v. Petroleum Management Corp. ... 196, 271, 275, 276, 279, 280-81, 282
Dowd v. Calabrese ... 486
Doyle v. Rhodes ... 659, 683
Dresser Indus., Inc. v. Lee ... 682-83 688-89
Duffies v. Duffies ... 251
Duggins v. Washington ... 590
Duncan v. Cessna Aircraft, Co. ... 671
Dunn v. Grisham ... 574
Dunn v. Hovic ... 632, 635
Dunson v. S.A. Allen, Inc. ... 9
Dwight v. Merritt ... 99
Dye v. State *ex rel.* Hale ... 814-15
Dynasteel Corp. v. Aztec Indus., Inc. ... 607-08

E

E.I. DuPont de Nemours v. Train ... 418, 451, 457, 463
Eagle Found v. Dole ... 464
Ealy v. Richardson-Merrell ... 495
Early-Gary, Inc. v. Walters ... 706, 749, 766
East Miss. Power Assoc. v. Porcelain Prod. Co. ... 729-30, 733
East River Steamship Corp. v. Transamerica Delaval ... 729
Eberly v. A-P Controls, Inc. ... 666
Edmonds v. Illinios Cent. Gulf R.R. ... 483
Edsco Mfg. Co., *In re* ... 309
Edwards v. Louisville Ladder Co. ... 244
Edwards v. Sears, Roebuck & Co. ... 727, 746, 764
Egan v. Clasbey ... 100
Eichenseer v. Reserve Life Ins. Co. ... 617-19, 622
Elias v. New Laurel Radio Station, Inc. ... 748
Elkins v. Richardson-Merrell, Inc. ... 479
Ellis v. K. Lan Co. ... 494
Ellis v. Pellegrini, Inc. ... 642
Eltringham v. Earhart ... 584, 630, 646
Employers Mutual Casualty Co. v. Tompkins ... 602-03, 622, 636
Ernest Yaeger & Sons, Inc. v. Howell ... 641
Eselin-Bullock & Assocs., Ins. Agency v. National Gen. Ins. Co. ... 607, 642
Espaniola v. Cawdrey Mars Joint Venture ... 659, 683, 690
Estate of Cargill v. City of Rochester ... 580
Estate of Waitzman ... 244
Etheridge v. Medical Ctr. Hosp. ... 808
Ex parte: ... see proper name

F

Fabre v. Marin ... 659, 663, 666-67, 676, 678, 683
Falk v. Moebs ... 105
Farley v. Engelken ... 821
Fedders Corp. v. Boatright ... 607
Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc. ... 238
Feemster v. City of Tupelo ... 817
Fein v. Permanente Medical Group ... 808
Ferguson v. Leaf River Prod., Inc. ... 396
Field [Marshall Field & Co.] v. Clark ... 34, 98, 119
Finkelberg v. Luckett ... 607, 611, 621
Fire Ins. Exch. v. Zenith Radio Corp. ... 235
First Am. Nat'l Bank v. Mitchell ... 632
First Evangelical Lutheran Church of Glendale v. County of Los Angeles ... 469
First Nat'l Bank of Hattiesburg v. Ellison ... 244
Fitzner Pontiac-Buick-Cadillac, Inc. v. Smith ... 726
Flight Line, Inc. v. Tanksley ... 388
Florida Rock Indus., Inc. v. United States ... 469
Florsheim v. Schilling ... 101
Floyd v. Carlisle Construction Co. ... 674
Floyd v. Medical Eng'g Corp. ... 368
FMC Corp. v. Train ... 457
Ford Motor Co. v. Adams ... 706
Ford Motor Co. v. Matthews ... 709, 745, 749
Ford Motor Co. v. Myers ... 700
Fowler v. State ... 482
Fowler Butane Gas Co. v. Varner ... 596, 598, 626, 733
Fowler v. Varner ... 595, 596, 625
Fox v. Cohen ... 247
Fox v. Smith ... 775, 792-93
Franklin v. Mazda Motor Corp. ... 805, 814
Frazier v. Continental Oil Co. ... 484
Frazier v. Esmark appeal, Inc. ... 683
Freeman v. Berg ... 671, 674
French Drug Co. v. Jones ... 820
Frey v. Snelgrove ... 671, 673
Friendly Fin. Co. v. Mallett ... 629
Frye v. United States ... 473, 474
FSC Securities Corp. v. McCormack ... 607, 612
Fuller v. Dilbert ... 282

Fusco v. General Motors Corp. 498, 501, 502, 503

G

Gagne v. Carl Bauier Schraubenfabrick 682
Gaither v. City of Tulsa 668
Galaraza v. Union Bus Lines, Inc. 244
Gann v. Northeastern Ry. Co. 106
Gardner v. Jones 621, 627, 733, 735
Garrett v. Gay 244
Garrison v. Louisiana 510
Gates v. Hensen 776
Gauthier v. OBrien 683
Gaylords of Meridian v. Sicard . . . 735
General Life Inv. Co. v. Shamburger 282
Genesco, Inc. v. J.C. Penney Co. . . 820
Genzel v. Halvorson 774
Geofroy v. Riggs 33
Geophysical Service, Inc. v. Thigpen 630
Gertz v. Robert Welch, Inc. 512
Gilligan, Will & Co. v. SEC 220
Gilsson v. Alachua County 470
Giltner v. Stark 263
Gitlow v. New York 509
Glascox v. Glascox 639
Glatstein v. Grund 254
Gleeson v. Virginia Midland R.R. . 37, 99
Glendening v. State 501
Glens Falls Ins. Co. v. Linwood Elevator 503
Goforth v. City of Ridgeland . . . . . .
Goodson v. State 499-503
Gordon v. Niagra Mach. & Tool Works 718-19
Gorder v. Sims 258
Gormley v. Bunynan 100
Gormly v. I. Lazar & Sons 658, 682
Gottlieb v. Gleiser 251
Grand Trunk Ry. Co. v. Ives 98
Granquist v. Crystal Springs Lumber Co. 651
Grantham v. Mississippi Dept. of Corrections 553
Graves v. Daley 235-36
Gray v. Cleaning Systems & Supplies,Inc. 682
Gray v. Grunnagle 775
Gray v. Manitowoc Co., Inc. 710
Greenway v. Greenway 261
Greenwood Utils. Comm'n v. Mississippi Power co. 488
Gregory v. Stetson 102
Grenada Bank v. Lester 641
Grenader v. Spitz 313
Griffith v. Gulf Ref. Co. 805
Grimes v. Pearl River Valley Water Sup. Dist. 578-79, 810
Griset v. Fair Political Practices Comm'n 521, 523, 524, 525, 531
Grojean v. Spenser 777
Gufstafson v. Benda 647
Gulf Guar. Life Ins. Co. v. Kelly . . 742
Gulf, M. & O. R.R. v. Hawthorne . 621

H

Hadad v. Lockeby 595-96
Hall v. Hilbun 778, 786
Hall v. Mississippi Chem. Express, Inc. 711
Hall v. State 821
Hamilton Fixture Co. v. Anderson 706, 731
Haney v. Francewar 655, 670
Hannibal & St. Joseph R.R. v. Missouri River Packet co. 38, 105
Hardin v. City of Devalls Bluff . . . 580
Hardin v. Manitowoc-Forsythe Corp. 682, 686
Hardy v. Brantley 500, 502
Hardy v. Raines 259
Hargraves v. Ballou 259
Hargrove v. Town of Cocoa Beach 542
Harisiades v. Shaughnessy 574
Harrison, *Ex parte* 524
Harrist v. Spencer-Harris Tool Co. 702, 718, 749, 751
Hart v. Marshall Co. 639
Hart v. Walker 639
Harvey-Latham Real Estate v. Underwriters at Lloyd's 605-06
621-22

Hastings & Dakota R.R. v. Whitney 40, 103
Hattiesburg Firefighters Local 184 v. City of Hattiesburg 820
Hawthorn v. Illinois Cent. Gulf R.R. 368
Hazen v. Municipality of Anchorage 234
Heath v. Wallace 40, 100
Heermance v. James 251
Heirn v. M'Caughan 588
Heist v. Heist 260
Henderson Bridge Co. v. McGrath 102
Henderson by and through Hartsfield v. Alabama Power Co. 807-08
Henderson v. Hayden Stone, Inc. 280
Henry v. Collins 633, 637
Herald Publishing Co. v. Tornillo 519
Hewlette v. George 639
Hilcox v. Holleman 504
Hilen v. Harp 650
Hilen v. Hays 647
Hill v. Stewart 778
Hill York Co. v. American International Franchises, Inc. 273-74
Hinds - Rankin Metro. Water & Sewer Ass'n v. Reid 504
Hines v. Imperial Naval Stores Co. 610-11
Hirtenstein v. Tenney 283
Hitchcock v. United States 788-89
Hoffman v. Jones 650
Honda Motor Co. v. Oberg 617, 633, 644
Hood v. Dealers Transport Co. 638
Hood v. Moffett 593, 600
Hook v. Rothstein 787
Hooker Chem. & Plastics Corp. v. Train 457
Hosford v. State 500-01
Hot Springs R.R. v. Williamson 101
House v. State 501, 504
Howard v. Stillwell & Bierce Mfg. Co. 100
Hubbard v. Leaf River Forest Prod., Inc. 375, 393, 394
Huber v. Henley 669
Hudson v. Parvin 776, 780, 789, 792-93
Hudson v. Rausa 553
Hudson v. Taleff 806
Hughes v. SEC 136
Hunnicutt v. Wright 675, 679
Hunt v. Chang 256
Hunt v. Hunt 263
Hunt v. Marshall County 638
Hunter v. Williams 642

I

Illinois Cent. Gulf R.R. v. Stedman 388
Illinois Cent. R.R. v. Cole 642
Illinois Cent. R.R. v. Ramsay 586
Illinois Cent. R.R. v. White 609
In re: ..... See proper name
International Bhd. of Tramsters v. Daniel 349
Interstate Co. v. Garnett 633, 637
Interstate Land Co. v. Maxwell Land Grant Co. 100
Ipock v. Gilmore 793
Ira Haupt & Co., *In re* 136
Ivy v. General Motors Acceptance Corp. 619-20, 644, 733

J

J'Aire Corp. v. Gregory 243
Jackson v. Johns-Manville Sales Corp. 631, 736, 743-44
James City County v. EPA 465
James W. Sessums Co. v. McDaniel 641
Jamison v. Moon 589-90
Japanese Elec. Prods. Anti-Trust Litig., *In re* 495
Jeanne v. Hawkes Hosp. 805
Jefferson v. Bates 742
Jenkins, *Ex parte* 86
JI Case Co. v. McCartin-McAulifee Plumbing & Heating, Inc. 694
Jinarb v. Nakkab 780
Johnson v. Brewer 739
Johnson v. Christian 105
Johnson v. Red Panther Chem. Co. 368
Johnson v. St. Louis, Iron Mountain & Southern R.R. 39, 99
Johnson v. St. Vincent Hosp., Inc. 808

Johnson v. State 501
Johnson v. Western Union Tel. Co. 590
Johnston v. Bumba 190-91, 196 198-99, 208, 210
Joint E.& S. Dist. Asbestos Litig., *In re* 385
Jones v. Carter 633
Jones v. Knight 541-44, 577
Jones v. Mayor of Jackson 393
Jones v. Schaffer 758, 760
Jones v. Stubbs 755
Joseph v. Naylor 260
Joseph v. Tennessee Partners, Inc. 553
Joser v. New York Prop. Ins. Underwriting Ass'n 685

K

Kaatz v. Alaska 650
Kathios v. General Motors Corp. . 658 671-72
Kawananakoa v. Polybank 541
Kennecott v. EPA 456, 463
Kidd v. Pearson 36, 105, 118-19
Kirk v. Koch 249-50, 263-64
Kirksey v. Dye 813
Kitchen v. Mississippi Ins. Guaranty Ass'n 640
Kleber v. Allin 260
Kneeland v. Bass Foundry & Mach. Works 99
Kneeland v. Lawrence 99
Knight v. United States Land Assoc. 40, 99
Koehler v. Koehler 254
Koehler v. Pulvers 196
Koplin v. Rosel Well Perforators, Inc. 243
Kordosky v. Conway Fire & Safety, Inc. 683, 693
Krebs v. McNeal 527
Krenkle v. Selleck 254

L

La Raia v. Superior Court 237-38
Lahocki v. Cantee Sand & Gravel Co. 661
Lake County v. Graham 103
Lake County v. Rollins 37-38, 103
Lake v. Construction Mach., Inc. . 683
Lambertson v. Cincinnati Corp. 683, 692, 694
Landreth Timber Co. v. Landreth . 132
Lane v. Webb 599
Lange, *Ex parte* 71
Lasselle v. Special Prod. Co. 671
The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States 34
Latham v. Hayes 782-83, 788-89
Laubach v. Morgan 653
Lawrence v. Virginia Ins. Reciprocal 639-41
Leaf River Prod., Inc. v. Hubbard . 396
Lee County Bd. of Supervisors v. Fortune 560
Leonard v. Johns-Manville Sales Corp. 683
Lerwill v. Regent Van & Storage Co. 661
Levi v. Mississippi State Bar 739
Li v. Yellow Cab Co. 651
Liberty Universal Ins.Co. v. Hall . 375
Life Ins. Co. v. Allen 605, 621
Lincoln Nat'l Life Ins. Co. v. Crews 742
Lines v. Ryan 655, 659
Little v. Bowers 102
Lockett v. State 819
Long v. Fischer 258
Louisiana v. Foret 499
Loveladies Harbor, Inc. v. United States 469
Lovell v. Cragin 101
Lucas v. South Carolina Coastal Comm'n 469
Lucas v. United States 805, 812-13
Lujan v. National Wildlife Federation 467-68
Lundy v. Lititz Mut. Ins. Co. 375
Lusby v. Kansas City, M. & B.R. . 587
Lyle v. Mladinichi 776
Lynch v. Merrell Nat'l Labs 479
Lyon v. Alley 103
Lyon v. Perin & Gaff Mfg. Co. 105

M

The Madrid 39, 106
Magnolia Hosp. v. More 504
Manasco v. Walley ... 511, 517, 519, 528
Manchester v. Bankhead Corp. ... 683
Manning v. Amy 99
Marcel v. Placid Oil Co. 492-93
Marchand v. Griffon 99
Mark v. FSC Sec. Corp. 271
Marks v. FSC Sec. Corp. 163
Marks v. Pan AM World Airways, Inc. 481
Marshall v. Chawla 552
Marshall v. The Clinic for Women, P.A. 776, 778, 785-87
Martin v. Illinois Cent. R.R. 254
Marx v. Broom 396
Mary S. Krech Trust v. The Lake Apartments 271, 279
Mason v. Marshall 281
Masonite Corp. v. International Woodworkers 623, 739
Matter of Contest of Election in DFL Primary 519
Maupin v. Dennis 596
May v. V.F.W. Post No. 2539 776
Mayfield v. Johnson 596
McCall by Andrews v. Batson 541-42
McCall v. California 101, 119
McCardle v. Regional Value Corp. 669, 681
McClellan v. Poole 681
McCulloch v. Maryland 79
McDaniel v. Ritter 650-51
McDermott, Inc. v. AmClyde 653, 675-76, 679-80
McGoldrick Oil Co. v. Greene County 552-53
McGory v. Allstate Ins. Co. . 623, 638-39
McIntyre v. Balestine ... 653-54, 660-61, 669
McKay v. Boyd Constr. Co. 553
McKey v. Village of Hyde Park ... 102
McKinley v. United States 470
McKinstry v. United States 106
McLish v. Ross 99
McPherson v. Buick Motor Co. ... 700
McRae v. Robinson 252-55
Meadow Brook Nat'l Bank v. Levine 283
Mekdeci v. Merrill Nat'l Labs. 478
Melton v. Deere & Co. 710
Memphis & C. R.R. v. Green 586
Merrill v. Town of Monticello 100
Merritt v. Cameron 40, 100
Mervis v. Wolverton 639
Messmer v. Teacher's Ins. Co. 666-67
Metropolitan Nat'l Bank v. Claggett 99
Michigan v. Long 804
Miles v. Board of Supervisors 809-10
Miller v. Montgomery County .. 232, 237
Miller v. Pearce 260
Mills v. Alabama 515
Mills v. Brown 668
Mills v. MMM Carpets, Inc. ... 648, 659, 683, 687-88
Milner Hotels, Inc. v. Dougherty .. 637
Minneapolis v. St. L. R.R. v. Bombolis 806
Mississippi Baptist Hosp. v. Holmes 546, 579
Mississippi Dioxin Litigation, *In re*: 372-73, 388
Mississippi Farm Bureau Ins. Co. v. Garrett 501
Mississippi Milk Comm'n v. Vance 820
Mississippi Power Co. v. Byrd 594
Mississippi Power Co. v. Harper .. 594
Mississippi Power & Light v. Harrison 630
Mississippi Power Co. v. Jones 628, 632, 640
Mississippi v. McPhail 808
Missouri Pac. R.R. v. Tircuit 388
Mitchell v. State 499
Mitchell v. United States 317
Mladinich v. Kohn 576
Mohr v. Williams 774
Monitor Patriot Co. v. Ray 510, 512, 513-14
Montoya v. AKAL, Sec., Inc. 683
Moore v. Grillis 811
Moore v. Mobile Infirmary Ass'n 804, 807-08
Moore v. The Kroger Co. 762-63
Morefield v. Moore 521, 522
Morgan v. City of Ruleville.......
Morgan v. Null 35

Morgan v. Struthers 103
Morris v. Savoy 820
Mosee v. Clark 519
Mower v. Leicaster 541
Muchisky v. Kornegay 258
Muller v. Norton 103
Munn v. Illinois 36
Mutual Life Ins. Co. v. Estate of Wesson 603-04, 636, 643

N

1902 Atlantic Ltd. v. Hudson..... 464
NAACP v. Alabama *ex rel.* Patterson 523
Nally v. Volkswagen of Am., Inc. . 235
Nance v. Gulf Oil Corp. 782
National Ass'n of Metal Finishers v. EPA 456
National Audubon Soc'y v. Hartz Mountain Dev. Corp. 465
National Casualty Co. v. City of Poughkeepsie 683
National Resources Defense Council, Inc.
  822 F.2d 104 (D.C. Cir. 1987) 467
  824 F.2d 1146 (D.C. Cir. 197) 416, 421, 462
  695 F. Supp. 48 (D.C. Cir. 1988) 416
  859 F.2d 156 (D.C. Cir. 1988) 466
  683 F.2d 1420 (9th Cir. 1988) 463, 466
National Union Fire Ins. Co. v. A.A.R. Western Skyways, Inc. . .660-61
National Wildlife v. Coleman..... 461
Natural Resource Defense Council, Inc. v. Callaway 462
Natural Resource Defense Council, Inc. v. Morton 434, 438
Natural Resource Defense Council Inc. v. Costel 428, 462
Natural Resource Defense Council, Inc. v. Duvall 434
Natural Resource Defense, Inc. v. Train 462, 467
Neagle, *In re* . 34-35, 41, 67-90, 101, 119
Nelson v. Concrete Supply Co. ... 650
Nelson v. Jacobsen.... 251-52,, 256, 260
Nelson v. State 499
New Hampshire Ins. Co. v. Smith 742
New Orleans, J. & G.N. R.R. v. Allbritton 587, 589
New Orleans, J. & G.N. R.R. v. Bailey 589
New Orelans, J. & G.N. R.R. v. Hurst 585, 589
New Orleans, J. & G.N. R.R. v. Statham 586-87, 626, 645
New York *ex rel.* New York Elec. Lines Co. v. Squire............ 98
New York, L.E. & W. R.R. v. Winter's Adm'r 98
New York Life Ins. Co. v. Ware .. 807
New York Times Co. v. Sullivan .. 510 511, 512, 514
New York v. Colorado Mining Syndicate & Co. v. Fraser...... 103
Newell v. State 499-500, 815
Newsome v. Henry......... 637, 742-43
Nichols v. Western Auto Supply Co. 747
Noble v. Hammond 104
Nollan v. California Coastal Comm'n 469
Norfolk & R.R. v. Pennsylvania .. 101, 119
North v. Peters 100

O

O'Conner v. Commonwealth Edison Co. 484
O'Gilvie v. International Playtex, Inc. 669
Ocala Star-Banner Co. v. Damron 512, 513
Old Casualty Ins. Co. v. Clemmer 640
Osburn v. Anchor Labs, Inc. 487, 488, 493
Overstreet v. Merlos 261-62
Oxendine v. Merrell Dow Pharmaceuticals 478

P

Pacific Express Co. v. Seibert 98

Pacific Mut. Life Ins. Co. v. Haslip 614-15, 629, 644
Palila v. Hawaii Dep't of Land & Natural Resources (Palila I) 442
(Palila II) 442
(Palila III) 442
(Palila IV) 442
Palmer v. Biloxi Reg. Med. Ctr., Inc. 502-03, 505, 782-84, 789, 792-93
Paoli R.R. Yard PCB Litig., *In Re* 488, 496-97, 503-04
Parker v. Ford Motor Co. 766
Parker v. Thyssen Mining Constr., Inc. 243
Parks, *Ex parte* 71
Parley's Park Silver Mining Co. v. Kerr 103
Parmes v. Illinois Cent. R.R. 502
Patton v. Ingersoll-Rand Co. 367
Paul v. N.L. Indus. 656, 659, 664, 671
Pauscher v. Iowa Methodist Med. Ctr. 777, 784
Payne v. Bartlett 639
Pennoyer v. McConnaughy 100
Pennsylvania Coal Co. v. Mahon 466
Penzell v. New York 659, 671
People v. Barbara 475
People v. Bongiorni 524
People v. Kelly 475
Perkins v. Volkswagen of Am., Inc. 484
Pestrak v. Ohio Elections Comm'n 516
Peteet v. Dow Chem. Co. 484, 487
Peterson Engine Co. 309
Petrik v. Monarch Printing Corp. 247
Petty v. Ideco, Div. of Dresser Indus., Inc. 498
Pharr v. Anderson 482, 501
Phillips v. Hull 776-77, 781, 783-84, 787, 789, 791, 793-94
Pierringer v. Hager 661, 671
Pittman v. Kaiser Aluminum & Chem. Corp. 771
Pittman v. Thorndike 761
Placek v. City of Sterling Heights 650
Planters Wholesale Groc. v. Kincaid 598, 626
Pocatello Indus. Park Co. v. Steel West, Inc. 655, 659, 670
Poirrier v. Degrande 502
Polk v. Sexton 612
Poller v. Columbia Broadcasting Systems, Inc. 495
Portland Cement Ass'n v. Ruckelshaus 457
Potts v. Benjamin 498
Prendergast v. Nelson 813
Presley v. Mississippi State Hgy Comm'n 539-40, 622, 810-11, 814
Presley v. Mississippi State Highway Comm. 539-40, 557-62 570-71, 573, 578-79
Prigg v. Pennsylvania 92
Prince v. Leesona Corp. 682, 686
Printing Industries of Gulf Coast v. Hill 526
Prodgett v. Spencer Harris Tool Co. 718
Progressive Casualty Ins. Co. v. Keys 742
Protective Serv. Life Ins. Co. v. Carter 246
Pruett v. City of Rosedale 538, 541-42 544-46, 579-80, 622, 871

Q

R

R. Clinton Constr. Co. v. Bryant & Reeves, Inc. 731
Rabatin v. Columbus Lines, Inc. 682
Rajnowski v. St. Patrick's Hosp. 776
Ralston v. Casanova 236
Ralston Purina Co. v. Howell 731
Randolph v. Laeisz 481
Rector v. Mississippi State Highway Comm'n 569
Red Lion Broadcasting Co. v. FCC 519
Red River Cattle Co. v. Needham 106
Redfern v. Collins 244
Reed v. Gilfoy 627
Region VII, Mental Health-Mental Retardation Ctr. v. Isaac 553

Reid v. State Farm Mut. Auto. Ins. Co. 243
Reikes v. Martin 778, 780, 788-89
Reserve Life Ins. Co. v. McGee . . . 735
Reves v. Ernst & Young 132
Reynolds Metal Co. v. EPA 456
Richardson v. Rankin Co. Sch. Dist. 554-55, 576, 579, 823
Richardson v. Richardson-Merrell, Inc. 479, 495
Richardson's Ex'r v. Green 102
Riseman v. Orion Research, Inc. . . 196
Roadway Express, Inc. v. Piper . . . 231
Robinette & Co. 283
Robinson & Pattison v. Goings . . . 590
Robinson v. Indianola Mun. Separate Sch. Dist. 553
Roe v. Wade 775
Rolater v. Strain 774
Rolph v. Board of Trustees 817
Ross v. Hodges 776-79, 781, 796
Rowland, *Ex parte* 71
Royal Oil Co. v. Wells 624
Runcorn v. Sheaner Lumber Prod., Inc. 683, 693
Russell v. Men of Devon 541
Rybachek v. EPA 466, 470

S

Sam Shainberg Co. of Jackson v. Barlow 765-66
Samsel v. Wheeler Transport Serv. 813
Sanders v. Smith 778
Sanders v. Tillman 756
Sandifer Oil Co. v. Dew 596, 633
Saunders v. Alford 262-64, 637
Scales v. St. Louis-S.F. Ry. Co. . . . 688
Schloendorff v. Society of New York Hosp. 774
Schneider v. Mistele 263
School Asbestosos Litig., *In re* 632
Schraeder Mining & Mfg. Co. v. Packer 104
Schuster v. Municipal Ct. 529
Scott v. O'Brien 258
Scott v. Rizzo 650
Seals v. St. Regis Paper Co. 599
Sebastian v. Kluttz 260
SEC No-Action Letters
  Alan W. Peryam 292
  Alaska Co. 213
  Alaska Commercial Co. 316
  Alma Securities Corp. 212
  American Bar Assoc.: *In re* Rule 701 299
  American Computer Communications Co. 314
  Arthur M. Borden, Sage Gray Todd & Sims 210
  Aspen Grove 209
  Bancorp, Inc. 316
  Barry Geller; Econative Corp. 211
  Bateman, Eichler, Hill-Richards 211
  Berkley & Co. 315
  Black Box, Inc. 199-201
  Block 16 Office Partners 202
  Borden & Ball 210
  Bridge Info Sys., Inc. . . . 202-03, 299
  Brobeck, Phleger & Harrison . 305
  Canadian Imperial Bank of Commerce 291
  Central Point Software, Inc. . . 305
  Clover Financial Corp. 196
  Commonwealth Equity Trust . 319
  Country First Bank 200
  Dawson Oil Corp. 210
  Devon Energy Corp. 295
  Diplomat, Ltd. 320
  E.F. Hutton & Co. 211
  Eastern Leasing Corp. 315
  Eau Claire Hotel, Inc. 317
  ENI Corp. 210
  Equity Management Corp. . . . 175
  Exceptional Producers Holding Co. 292
  Fair Valley Properties No. 2 . . 319
  Financial Planning Clinics Sec. Corp. 175
  First Commerce Trust Co. . . . 312
  Frontier Capital Management Co. 202
  Genesee Merchants Bank & Trust Co. 319
  GHM/Massachusetts Health Care Partners-I Ltd. Partnership 313

Gerald F. Gerstenfeld 212
Gold Coast Bancshares 319
Golfpro, Inc................ 292
Hall, Moneytree Associates... 174
H.B. Shaine & Co. 211
Hecker & Phillips........... 194
Herff Jones, Inc. 292
Hopper, Kanouff, Smith & Peryane.................. 194
I-Stat Corp. 295
The Immune Response Corp. . 200
Interstate Sec. Corp. 315
Intuit Telecom, Inc. 198
Jack B. Straus, Jr., Esq. 213
Jackson, Tufts, Cole & Black..............294, 296, 298
JBI, Inc. 200
Jesse M. Brill 219
J.Y. Barry Arbitrage Management, Inc.......... 152
Kenai Oil & Gas, Inc. 175
Lane Enterprises, Inc........ 176
LaserFax, Inc............. 196, 199
Leastec Corp................ 315
Louisiana Motor Inns 313
Kenman Corp., *In Re* 209
Madison Partners, Ltd. 175
Markham Inv., Inc. 180
Marshalls Fin. LTD & Lasser Marshall, Inc. 290, 293
Merit Communications, Inc... 213
Mineral Lands Research & Marketing Corp. 207-08
Minnesota Cablesystems-Southwest................ 318
Monitrend Inv. Management, Inc. 201
NABA Sports Corp. 202
Nancy H. Blasberg.......... 213
Nemo Capital Partners L.P... 164
Nigh Sav., Inc. (July 25, 1987).................... 202
Nigh Sav., Inc. (Sept. 15, 1987).................... 202
NJR Investments Ltd. Partnership 312
North American Invest....... 319
North American Leisure Group, Inc................ 202
Northwest Med. Resources, Inc. 315
Opportunities Inv. Assocs. of New London, Conn. 320
Pacific Physician Services, Inc. 203
Pennsylvania Securities Commission 210
Peoria Journal Star, Inc...... 291
Peter I. Mason 194
Praxis Biologies, Inc. 296
Printing Enterprises Management Science, Inc... 212
Professional Food-Serv. Mgmt., Inc................ 293
Randall S. Dalton........... 205
Raymond, James & Assocs., Inc. 171
Robert T. Willis, Jr., P.C. 203
RPII Fund 168, 175
Saloman, Inc. 158
SCI Fin. Group, Inc. 292
San Jose Capital Corp. 221
Scientific Mfg., Inc. 319
Sentinel Group, Inc.......... 294
Shaw, Pittman, Potts & Trowbridge............... 152
Sonnenblick, Parker & Selvers 200
Squadron, Ellenoff, Pleasant & Lehrer................ 201
Starbucks Corp. 291
Taggs Ltd. 310
Tax Investment Information Group 213
Texas Investor Newsletter ... 213
Trimble Navigation 305
Union Bank of Finland, Ltd. . 291
United States Cellular Corp. 151, 178
Verticom, Inc. 199
Vintage Group, Inc. 200
Vulture Petroleum Corp...... 200
Watson, Ess, Marshall & Enggas 294, 300
Webster Management Assured Return Equity Management Group Trust.............. 208
West Seattle Food Co-Op 310
West Side Nat'l Bank 312

Woodtrails-Seattle, Ltd. 206-07
SEC v. Allison 311
SEC v. Continental Tobacco Co. 214, 274, 283
SEC v. Freeman 210
SEC v. Hillsborough Investment Corp. 321
SEC v. Karczewski 135
SEC v. Koscot Interplanetary, Inc. 135
SEC v. Manor Nursing Centers, Inc. 191
SEC v. Manus 271
SEC v. McDonald Invest. Co. 314
SEC v. Murphy 151, 196-97, 271
SEC v. North Am. Research & Dev. Corp. 214
SEC v. Ralston Purina Co..... 135, 138, 206, 271-72, 282-83
SEC v. Southwest Coal & Energy Co. 191
SEC v. Spence & Green Chem. Co. 283, 308
SEC v. Truckee Showboat, Inc.... 314
SEC v. W.J. Howey Co......... 133, 135
Seismic Petroleum Serv. Inc. v. Ryan 735
Senatobia Community Hosp. v. Orr 387
Shainberg Co. v. Barlow 636
Shaw v. Stringer 258
Sheffield v. Beckwith 259
Shetter v. Rochelle 777
Siebold, *Ex parte* 71, 84-85
Sierra Club v. Corsuch 419
Silver v. Kent 589
Simmons v. Saul 100
Simmons-Belk, Inc. v. May 244
Simon v. Eastern Ky. Welfare Rights Org. 466
Sitzes v. Anchor Motor Freight, Inc. 661
Smith v. Department of Insurance 812-13, 824
Smith v. Garrett 754
Smith v. State 819
Smith v. Superior Court 228, 230, 239-40, 245-47
Smith v. Transcontinental Gas Pipeline Corp. 817
Snortland v. Crawford 517
Snow Lake Shores Prop. Owners Corp. v. Smith 611, 628, 734
Snowden v. Osborne ... 630, 635-36, 735
Snowden v. Tompkins 634-35
Snyder v. Harris 384
Soden v. Freightliner Corp. 488, 495
Sofie v. Fibreboard Corp. 805, 808
Solarex Corp. v. Arco Solar, Inc. .. 486
Sorrell v. SEC 271
South Central Bell v. Epps 608-09, 626, 734
Southeastern Express Co. v. Thompson 642
Southern Co. of Nevada v. Silva .. 105
Southern Express Co. v. Brown .. 589
Southern Nat'l Gas Co. v. Fritz ... 607
Southern R.R. v. Kendrick 586, 628
Sovereign Camp, W.O.W. v. Boykin 627
Sperry-New Holland v. Prestage . . 709-10 711-12, 746-47
St. Paul, M & M. Ry. v. Phelps ... 100
St. Regis Paper Co. v. Seals 597
Stacey v. Bango Punta Corp. ... 659, 671
Stadia Oil & Uranium Co. v. Wheelis 321
Stamper v. Edwards 577
Standard Life Ins. Co. v. Veal 814, 600-01, 733, 814, 816
Stanton v. Cox 257-59, 264
Stark v. Posh Constr. Co. . . 659, 683, 694
Starnes v. City of Vardaman 539, 555, 561, 566
State *ex rel.* Moore v. Molpus 577
State *ex rel.* Woytus v. Ryan 772
State Farm Fire & Casualty Co. v. Simpson 624
State Farm Mut. Auto Ins. Co. v. Daughdrill 639-40
State Stove Mfg. Co. v. Hodges . . 698-99, 701-02, 725-26, 729
State v. Babst 522
State v. Black 501
State v. Burgess 522, 524
State v. Catore 501
State v. Fulton 522
State v. Haseltine 501
State v. Lash 501
State v. Lewis 543

State v. North Dakota Education Ass'n ... 523
State v. Russell ... 133
State v. Traylor ... 649
Stegall v. WTWV, Inc. ... 739
Steinberger v. Western Union Tel. Co. ... 592
Sterba v. Joy ... 683
Sterling v. Velsicol Chem. Corp. ... 493
Stop H-3 Ass'n v. Dole ... 464
Stoppelman v. Owens ... 271
Storm v. Green ... 590
Strait v. Pat Harrison Waterway Dist. ... 554
Strauder v. West Virginia ... 80
Strelov v. Hertz Corp. ... 235
Strickland v. Rossini ... 626
Stringfellow v. Reed ... 681
Strong v. United States ... 106
Sullivan v. Rowan Cos. ... 493
Sullivan v. Scoular Grain Co. ... 659, 683, 689-90
Swan v. I.P., Inc. ... 718, 720
Sweet Home Chapter of Communities for a Greater Oregon v. Babbitt ... 442
Swenson v. Engelstad ... 281
Sykes v. Grantham ... 553
Synnott v. Shaughnessy ... 103

T

T.C.L., Inc. v. LaCoste ... 634
T.G. Blackwell Chev. Co. v. Eshee ... 734
Talley v. California ... 521, 523
Tanner's Council of Am., Inc. v. Train ... 457
Taylor v. Delgarno Transp., Inc. ... 683
Teche Lines, Inc. v. Pope ... 596-97, 621
Tennessee v. Davis ... 81, 84-85
Tennessee Valley Authority v. Hill ... 440
Texas Mun. Power Agency v. EPA ... 456
Texas v. EPA ... 419
Thomas v. Rounds ... 648
Thompson v. Barnett ... 785
Thompson v. First Miss. Nat'l Bank ... 806
Thompson v. Johnson ... 639
Thompson v. Southern Pac. Transp. Co. ... 498
Thornhill v. State ... 502
Thornton v. Insurance Co. of North Am. ... 753-54, 758
Tice v. Mandel ... 259
Tideway Oil Programs, Inc. v. Serio ... 610-11, 623, 629, 646, 814
Toliver v. General Motors Corp. ... 706-07, 716-17
Toney v. Kawasake Heavy Indus., Ltd. ... 710
Town of Newton v. Wilson ... 639
Townsend v. State ... 501
Toyota Motor Co. Ltd. v. Sanford ... 746
Transport Indem. Co. v. Scott ... 735
Trapp v. Cayson ... 794
Troyer v. State ... 580
Trust Co. Bank v. U.S. Gypsum Co. ... 389
TSC Indus., Inc. v. Northway, Inc. ... 189
Turner v. Temple ... 778
TXO Prod. Corp. v. Alliance Resources Corp. ... 616-17, 644-46
Tucker v. Tucker ... 252

U

United States *ex rel.* Redfield v. Windom ... 100
United States Fidelity & Guar. Co. v. Stringfellow ... 640
United States v. Addison ... 475, 489
United States v. Amaral ... 489
United States v. American Telephone & Co. ... 398
United States v. Arundel Corp. ... 608
United States v. Baller ... 475
United States v. Beebe ... 105
United States v. Bennett ... 475
United States v. Breen ... 40, 106
United States v. Brown ... ??-
United States v. Chase ... 38, 101
United States v. Coolidge ... 81
United States v. Corwin ... 104
United States v. Custer Channel Wing Corp. ... 214
United States v. Davis ... 102

United States v. Downing . 482, 483, 489
United States v. Edelman 489
United States v. Ferri 477
United States v. Fisher 79
United States v. Fohsher 475, 483
United States v. Hill 214
United States v. Hudson 81
United States v. Insco 523
United States v. Jones 102
United States v. Kirby 73
United States v. Martinez 483, 492
United States v. McDonald 104
United States v. Reese 80
United States v. Reisinger 104
United States v. Reliable Transfer Co. 648
United States v. Samples 476
United States v. San Jacintotin Co. 78
United States v. Sanges 35, 105
United States v. Schofield 102
United States v. Scott 523
United States v. Sherwood 136
United States v. Smith 486
United States v. Texas 34
United States v. Voorhees 101
United States v. Waters 102
United States v. Watson 104
United States v. Weld 38, 105
United States v. Williams 475
United States v. Wilson 98
United States v. Wolfson 136
Universal Service Corp. 309
Urban Renewal Agency v. Tackett 639

V

Valley Forge Ins. Co. v. Strickland 606, 612-13
Value Line Fund, Inc. v. Marcus . 282
Van Dyke v. Coburn Enterprises, Inc. 283
Van Ovost v. City of Ackerman . . . 564
Van Stone v. Stillwell & Bierce Mfg. Co. 98
Vanderslice v. Shoemake 640
Velasco v. Commercial Bldg. Maintenance Co. 242
Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. 449, 464
Vicksburg & J. R.R. v. Patton 589
Vicksburg & M. R.R. v. Scanlan 585, 643, 686
Vidrine v. Enger 640
Virginia, *Ex parte* 71
Virginia Gobble v. Bradford 661
Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc. 530
Viterbo v. Dow Chemical . 481, 484, 488, 489, 495, 499, 552, 553

W

W.J. Runyon & Son, Inc. v. Davis 761-62
Wagner v. Gibbs 639
Walker v. Lea 35, 106
Wallace v. Johnstone 104
Walls v. Mississippi State Bar . . . 739
Walt Disney World Co. v. Wood . . 695
Walter v. Wilson 259-61, 637
Walters v. Blackledge 579, 810
Walton v. Bourgeois 776
Washington & G. R.R. v. McDade 101
Washington v. Armstrong World Indus., Inc. 488
Washington v. Department of Transp. 682
Washington v. State 813
Watkins, *Ex parte* 71
Watson v. Shell Oil Co. 396
Webb v. County of Lincoln 554, 576, 579
Webb v. Jackson 555, 576, 578-79
Weems v. American Sec. Ins. Co. . 742
Wells v. Branscome 742
Wells v. Ortho Pharmaceutical Corp. 487
Weprin v. Peterson 148, 190, 208, 271, 281
West v. State 482, 504
Western Union Tel. Co. v. Koonce 592
Western Union Tel. Co. v. McKinney 592-93

Western Union Tel. Co. v. Ragsdale 592
Western Union Tel. Co. v. Watson 591-92
Weyerhaeuser Co. v. Costle 411, 447, 456, 457, 463
Wheaton v. Peters 81
Wheeler v. Cloyd 102
White v. City of Tupelo 553
White v. Esmark Apparel, Inc. 681-82, 684, 687
White v. Gautier Util. Dist. 817
White v. State 805
Whitney v. California 509
Whittington v. Whittington 633
Whittley v. City of Meridian 710
Wilborn v. Balfour 610, 622
William T. Thompson Co. v. General Nutrition Corp. 230
Williams v. Heard 36, 99, 118
Williams v. Kushner 813
Williams v. White Mountain Constr. Co., Inc. 683, 694
Wilson v. Beloit Corp. 243
Wilson v. Giordana Ins. Agency, Inc. 648, 651, 661
Wilson v. Los Angeles County Superior Court 519
Wilson v. Stocker 522
Wilt v. Buracker 499
Winfrey v. Citizens & S. Nat'l Bank 793
Winsmore v. Greenbank 251
Winterbottom v. Wright 699
Wirtz v. Switzer 607, 626, 734
Womble V. Singing River Hosp. 553
Wood v. Guarantee Trust & Safe Deposit Co.. 104
Woodbury v. C.B. Courtney 775
Woodruff v. Cook 232
Woolf v. S.D. Cohn & Co. 275, 279
Woytus v. Ryan 776
Wright v. Central du Page Hosp. Ass'n 805, 817-18
Wright v. National Warranty Co. 163
Wyeth Lab., Inc. v. Fortenberry 502, 719-20

X

Y

Yarbrough, *Ex parte* 71
Yarborough v. Phillips 748
Yazoo & M.V. R. Co. v. Carroll 653
Yazoo & M.V. R. v. Hardie 586-87, 629
Yazoo & M.V. R. v. May 687, 642, 823
Yazoo & M.V. R. v. Smith 633
Yazoo & M.V. R. v. Mitchell 568, 597
Yazoo & M.V. R. v. Williams 587, 597, 621
Yazoo & Miss. Valley R.R. v. May 821
Yazoo & Miss. Valley R.R. v. Williams 806
Young v. Jackson 796
Young v. Latta 659, 671
Young v. Verson Allsteel Press Co. 671
Young v. Clarendon Township 103

Z

Zahn v. International Paper Co. 385
Zarrella v. Robinson 256
Zwickler v. Koota 521, 522

ANNOUNCEMENT

We have purchased the
entire back stock and
reprint rights of —

MISSISSIPPI LAW JOURNAL

Complete sets to date
are now available. We
can also furnish single
volumes and issues.

FRED B. ROTHMAN & CO.
10368 W. Centennial Rd.
Littleton, Colorado 80127-4200

The *Mississippi Law Journal* (USPS No. 354-300) is published three times annually in Spring, Fall, and Winter, Editorial and business offices: *Mississippi Law Journal*, Law Center, University Circle, Room 111, University, Mississippi 38677-0849.

Current subscription: $35.00 per year. Single issue: $12.00. Subscriptions are renewed automatically upon expiration unless the subscriber sends notice of termination. For information about subscriptions, please call (601)232-7361, Extension 111.

POSTMASTER: Send address changes directly to *Mississippi Law Journal*, Law Center, University Circle, Room 111, P.O. Box 849, University, Mississippi 38677-0849. Include name, new address (including zip code), and old address. Please notify 45 days in advance to ensure prompt delivery.

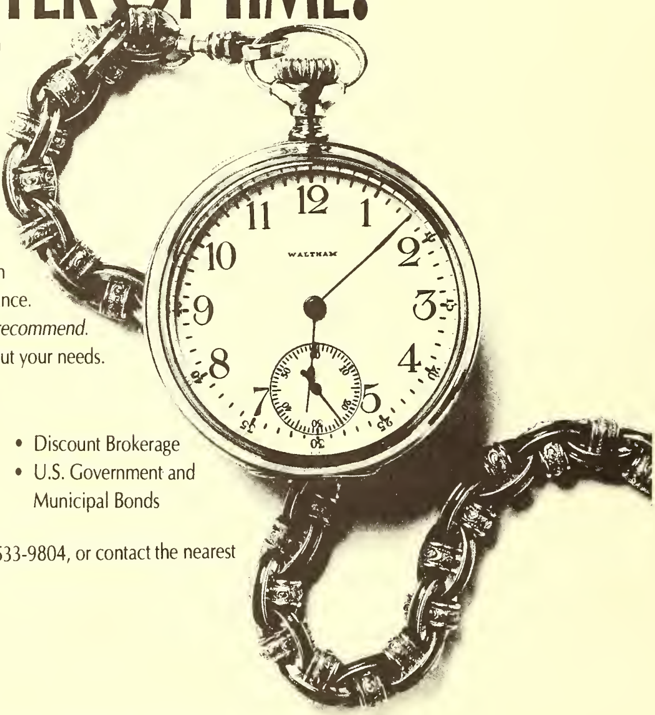
Unless a claim is made for nonreceipt of *Journal* issues within 6 months after the mailing date, the *Mississippi Law Journal* cannot be held responsible for supplying those issues without charge.

Citations conform to A UNIFORM SYSTEM OF CITATION (15th ed. 1991).

The *Mississippi Law Journal* is a member of the National Conference of Law Reviews.

To offer its contributors complete freedom, the *Journal* assumes no responsibility for the views expressed herein.

A MATTER OF TIME.



There's a difference between Trustmark Financial Services and the other firms that offer you investments.

It's a matter of time.

We invest our time–as much as it takes–to get a clear picture of your financial goals, your confidence in investing and your risk tolerance.

Then, and only then, we recommend.

So, come talk with us about your needs. We can help you with:

- Performance Funds
- Mutual Funds
- Self-Directed IRAs
- Discount Brokerage
- U.S. Government and Municipal Bonds

Call 354-5136, 1-800-533-9804, or contact the nearest Trustmark office.

TRUSTMARK FINANCIAL SERVICES, INC.

Investments for the Individual

The investment advisor for the Performance Funds is Trustmark National Bank. Furman Selz Inc. is the Fund's distributor and sponsor, and is unaffiliated with the Bank. The Performance Funds are not obligations of Trustmark National Bank nor are they FDIC insured.

A wholly owned subsidiary of Trustmark National Bank
Member, National Association of Securities Dealers
Securities Investor Protection Corporation